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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962
No. 222

Case No. 17235

PENSICK & GORDON, INC., *Appellant,*

vs.

CALIFORNIA MOTOR EXPRESS, *et al.*, *Appellees.*

Case No. 17380

PENSICK & GORDON, INC., a California corporation, *Appellant,*

vs.

CALIFORNIA MOTOR EXPRESS, LIMITED, a corporation, *et al.*, *Appellees.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Case No. 17380

PENSICK & GORDON, INC., a California corporation, *Appellant,*

vs.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Pensick & Gordon, Inc., the petitioner herein (plaintiff and appellant below), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed and entered in the above-entitled consolidated causes on 13 April, 1962.

Opinions Below.

The opinion of District Judge Byrne dismissing the complaint in No. 17235[1] for lack of jurisdiction is

[1]Where necessary to distinguish for clarity, the cause and appeal in No. 17235 will be referred to as the "First Cause" and "First Appeal" and those in No. 17380 will be referred to as the "Second Cause" and "Second Appeal," respectively.

unreported, but appears in the printed transcript of the record of the appeal in said cause [1 Tr. 94].[2] Judge Byrne rendered no opinion in support of his order dismissing the first amended complaint (the second cause); the court's order in this respect appears in the printed transcript of record of the second appeal [2 Tr. 194]; the transcript of the oral argument which preceded this order, however, does give some indication of the court's thinking in this respect [2 Tr. 210-279, at pp. 248-254, 258-261, 264-266, 275-279]. The opinion of the Court of Appeals is as yet unreported, but is printed and attached hereto as Appendix "A".

Grounds for Jurisdiction.

The District Court, pursuant to appropriate motions, dismissed the complaint in the first cause [1 Tr. 94] and the first amended complaint in the second cause [2 Tr. 194] for want of jurisdiction in each instance; The Court of Appeals affirmed these orders by its opinion in the consolidated appeals, erroneously, we submit. Review of these orders by this court is accordingly sought under 28 U. S. C. A., §1254(1).

The judgment of the Court of Appeals is dated 13 April, 1962 and was filed and entered the same date; no rehearing was sought or granted, nor has any order been sought or granted for an extension of time within which to petition for certiorari.

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[2]Page references to the printed transcript of record in the "First Appeal" will be preceded by the designation "1 Tr."; that in the "Second Appeal," "2 Tr." These printed transcripts have been forwarded by the Clerk of the Court of Appeals in accordance with Rule 21(4).

Questions Presented.

Two questions of major importance to the transportation industry, as well as to those sectors of the national economy dependent upon interstate motor common carriers for service, are ultimately involved in the instant causes: first, are federally certificated motor common carriers immune to damage suits by shippers? second, if shippers do, in fact, still retain private rights of action against such carriers for breach of the duty to serve are those rights barred or affected by the circumstance of a picket line at the shipper's place of business?

The immediate questions specifically presented are the following:

(1) Does a private shipper have the right to seek and obtain redress from motor common carriers for loss or damage suffered by the shipper as a consequence of the carriers' breach of the duty to render service;

(a) under the common law;

(b) under the statutory sanctions of the Motor Carrier Act (Interstate Commerce Act, Part II) Sections 216(b) and (d)?

(2) Assuming the existence of such a shipper's right of action, do the Federal Courts have jurisdiction thereof either by virtue of diversity of citizenship between the parties or as an action arising under an Act of Congress regulating commerce?

(3) Conversely stated, the foregoing two questions may be summarized as follows:

Did Congress intend by the Motor Carrier Act, to abolish *all* private rights of action in the courts

to recover damages from motor common carriers for breaches of the duties imposed upon them by Sections 216(b) and (d) of that Act and in effect to clothe such carriers with immunity therefrom?

(4) If a shipper has such a right of action, cognizable in the Federal Courts, is the courts' jurisdiction to hear and determine such a cause in any way affected by the fact that the refusal of service was due to the existence of a picket line at the shipper's place of business where

(a) No labor dispute existed between the shipper and the carriers; and

(b) the only defendants or other adversary parties to the litigation were carrier entities; and

(c) the only relief sought by the shipper was damages as against the carrier entities.

Statutes Involved.

Interstate Commerce Act, Section 216(b), (d) and (j); [49 U. S. C. A., Sec. 316(b), (d) and (j)].

"§316. RATES, FARES AND CHARGES—

. . .

"RATES, FACILITIES FOR CARRIERS OF PROPERTY

"(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and

practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

"UNDUE PREFERENCES OR PREJUDICES PROHBITED

"(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

"EFFECT ON REMEDY OR RIGHT OF ACTION.

"(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith. Feb. 4, 1887, c. 104, Part II, §216, as added Aug. 9, 1935, c. 498, 49 Stat. 558, and amended June 29, 1938, c. 811, §16, 52 Stat. 1240; Sept. 18, 1940, c. 722; Title I, §22(b-d), 54 Stat. 924."

Statement of the Case.

This is an action brought by a shipper against several ICC-certificated motor common carriers seeking money damages for losses suffered as a consequence of the refusal of the carriers to render service, in breach of their duty to do so. Petitioner (plaintiff and appellant below) in its complaint in the first cause alleged the breach by each of the respondent carriers (defendants and appellees below) of their common law and statutory duties to serve petitioner [1 Tr. 4-26].

The alleged breach lay in the failure of the carriers to make pick-ups and deliveries of goods at petitioner's place of business, in response to reasonable requests on the part of petitioner [1 Tr. 6-7].

In the original complaint, petitioner asserted jurisdiction under 28 U. S. C. A., Section 1332, diversity of citizenship, and under Section 1337 on the theory that contained among the various duties enunciated by Sections 216(b) and (d) of the Motor Carrier Act [Interstate Commerce Act, Part II, §316(b) & (d), 49 U. S. C. A. §316(b) & (d)], was a restatement of the common law duty to render service and to serve without

unjust preference or discrimination; that this statutory sanction gives rise to a right of action on the part of shippers for damages occasioned by its breach and that the cause, therefore, arose under an Act of Congress regulating commerce [1 Tr. 4].

Pursuant to appropriate motions to dismiss, the District Court, relying on *Consolidated Freightways v. United Truck Lines* (9th Cir. 1954), 216 F. 2d 543, decided that it did not have jurisdiction to hear and determine the controversy because "... the Motor Carrier Act does not provide *any* private remedy for a violation of *any* of its provisions" (emphasis added) [1 Tr. 94].

The appeal in the first cause was taken from this decision, naming, as appellees, those defendants as as against whom diversity of citizenship could not be shown [1 Tr. 95].[1]

Respondent then filed a first amended complaint (the second cause), bringing in certain additional carrier defendants and renaming those defendants to the original complaint which were not made appellees in the first appeal [2 Tr. 2-2h]; as to all of these, diversity of citizenship was this time alleged both generally *and* specifically [2 Tr. 2a-2d]. Petitioner again asserted jurisdiction on the basis of 28 U. S. C. A., Sections 1332 and 1337, but this time placed equal reliance upon

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[1]"The original complaint was prepared and filed against a large number of defendants under circumstances of urgency, and it was not possible in the time at hand to ascertain the facts regarding the citizenship of all of the various defendants; it contained, therefore, only general allegations of diversity and no factual specifications. As a consequence, the court, on the motion to dismiss, did not reach the question of whether there existed a common law basis of action apart from statutory consideration."

petitioner's common law right of action against a common carrier for breach of the duty to render service, on the theory that this right survived the passage of and existed apart from the Motor Carrier Act [2 Tr. 2a-2b].

Answers, as well as affidavits of various parties, asserted in both causes that the failure or refusal of service was due to the existence of a peaceful picket line at petitioner's place of business [2 Tr. 13, 20, 27, 34, 41, 119, 127-128, 135, 143, 150-151; 46, 78-80, 88-89, 90; 2 Tr. 78-79, 81-82, 84; Court of Appeals Op. p. 2].

Pursuant to motions timely brought, the District Court again dismissed without opinion, for want of jurisdiction over the matter [2 Tr. 192]. From this decision, the second appeal (in 17380) was taken.

Petitioner's basic contentions are, as stated in the opinion of the Court of Appeals, that it, as a shipper, invoked the duty of a common carrier to serve and to render service without unjust preference or discrimination; that the shipper's historic right of action at common law to recover damages in the courts for breach of that duty is in no way inconsistent with any power or exclusivity conferred upon the Interstate Commerce Commission (hereinafter referred to simply as "Commission") under the Motor Carrier Act; that the shipper's cause of action therefore continues in dual form both as a common law right under the savings clause

of the Act [Sec. 216(j); 49 U. S. C. A., Sec. 316(j)], as well as under the statutory sanctions of Sections 216(b) and (d) (49 U. S. C. A., Sec. 316(b) and (d)); and that the Federal Courts have jurisdiction over such actions.

The Court of Appeals, in its opinion, struck down both of these contentions holding that no matter what the basis asserted, the courts are closed to shippers aggrieved by unreasonable disservice or unjust discrimination on the part of motor common carriers for the reason that "whenever under a claim by a shipper that a motor common carrier has failed to serve, there arises a *genuine* issue as to the reasonableness of such disservice or unjustness of such discrimination, there exists no remedy in the courts available to the shipper, for the crucial questions of reasonableness or unjustness cannot be decided by the court". (Court of Appeals Op. p. 4).

A further contention raised in opposition to the position of petitioner below, but not reached by the Court of Appeals because of the particular ground of the holding, was that the District Court was without jurisdiction because the controversy between the parties raised issues within the exclusive primary jurisdiction of the National Labor Relations Board (hereinafter referred to simply as "Board") (Court of Appeals Op. p. 5).

Argument for Allowance of Writ.

As stated above, two general questions of major importance to the transportation and shipping industries, as well as those sectors of the business community dependent upon them, await resolution, if not entirely, then in substantial part, by the ultimate decision in this case.

The first is the question what if any, shippers' damage actions against motor common carriers survived the passage of the Federal Motor Carrier Act. (If the Court of Appeals decision below is literally applied, it will mean the virtual abolition of all such actions.)

The specific point involved in the instant case concerns the question whether a shipper has a right to recover damages for breach of the duty to render service. If, as we believe it must this Court should grant *certiorari* and ultimately hold that a shipper still retains such a right of action, the second major question must then be reached: to what extent is this or any such shipper's right affected by the circumstance that a picket line existed at the shipper's place of business at the times in question? This latter question involves the resolution of a seeming conflict between the national transportation policy and the national labor policy here presented in a context which, we submit, permits of such resolution only by this Court. (*Cf. Carpenters' Union v. Labor Board* (1958), 357 U. S. 93, 110.)

We believe the importance of these questions themselves argues for the issuance of the Writ in this case. However, with specific reference to the criteria enunciated by Rule 19 we discuss the matter further below.

The Decision of the Court of Appeals Below Conflicts With Decisions of Courts of Appeals in Different Circuits as Well as With Decisions of Federal District Courts in Other Circuits on the Same Matter.

The Court of Appeals has held in this case that a private shipper, injured by the failure or refusal of I. C. C.-certificated motor common carriers to serve it, in breach of their duty to do so, has no remedy or right to recover damages against the offending carriers. This is true, the court says, because their exists a genuine issue as to whether the action on the part of the carriers was reasonable or not and the Federal Courts are without jurisdiction to determine this issue since the Commission is the only body vested by Congress with such power. In so deciding, the Court of Appeals cites as governing the decision of this court in *T. I. M. E., Inc. v. United States* (1959), 159 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904.

(We emphasize that the decision below forecloses a shipper from *any* right to recover damages since the Motor Carrier Act, while vesting the Commission with certain powers over motor carriers, gave it no jurisdiction at all to hear damage claims or award damages. The rule of *T. I. M. E., Inc. v. United States* would of course, deny jurisdiction to a state as well as a Federal Court if applicable. We most earnestly and respectfully submit that it is not.)

The Court of Appeals decision herein is, therefore, in conflict with one Court of Appeals decision involving motor common carriers, *Meier & Pohlman Furniture Co. v. Gibbons* (1956, 8th Cir.) 233 F. 2d 296 (*cert.*

den. 352 U. S. 879), as well as several District Court jurisdictions in other circuits: *Merchandise Warehouse Company v. ABC Freight Forwarding Corp.* (1958, S/D, Indiana—7th Cir.), 165 Fed. Supp. 67; *Quaker State Motor Parts Co. v. Interstate Motor Freight, et al.* (1957, E/D Pennsylvania—3rd Cir.), 148 Fed. Supp. 226, and another Court of Appeals decision involving rail common carriers: *Minneapolis, etc., Railway Co. v. Pacific Gamble-Robinson Co.* (1954, 8th Cir.), 215 F. 2d 126. In all of the foregoing cases, the Courts accepted jurisdiction over, heard and determined such causes.

This latter case is pertinent here, we submit, since the decision in *T. I. M. E., Inc. v. United States, supra,* was based squarely upon a decision involving rail carriers[1] and an interpretation of Part I of the Interstate Commerce Act, notwithstanding the existence in that part of the Act of a section specifically authorizing private damage suits (Interstate Commerce Act, Part I, Sec. 8, 49 U. S. C. A., Sec. 8). In other words if the rule of *T. I. M. E., Inc. v. United States, supra,* operates to bar private shippers actions against motor carriers for damages, it would appear equally to bar such actions against rail carriers.

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[1] *Texas & Pacific Ruy. v. Abilene Cotton Oil* (1906), 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350.

The Opinion of the Court of Appeals Herein Constitutes an Unwarranted Extension and, Therefore, a Misapplication of Decisions of This Court.

We further submit that the opinion of the Court of Appeals herein constitutes an unwarranted extension of the rule in *T.I.M.E., Inc. v. United States, supra.* It represents therefore a decision on a Federal question which conflicts with applicable decisions of this Court.

In *T.I.M.E., Inc. v. United States, supra,* the majority held that a shipper, in post-shipment litigation, could not challenge in the courts the reasonableness of the carrier's charges which were made *in accordance with the tariffs governing a shipment.* In so deciding, the majority invalidated a split procedure which had grown up under the sanction of the Commission, pointing out that the Motor Carrier Act had conferred upon the Commission the exclusive right to fix and determine *rates* and that any challenge to this determination must be presented directly to the Commission and not indirectly through the Courts. As noted above, the decision was based squarely on the authority of this Court's earlier decision in *Texas and Pacific Railway v. Abilene Cotton Oil* (1906), 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, a landmark decision under the Interstate Commerce Act, Part I, and involving an action brought in a State Court against a rail common carrier.

The court in both decisions simply held that rate determinations made in accordance with Commission-established procedures could not be reviewed and re-

evaluated by individual State or Federal courts, or through that medium, since this would destroy the very uniformity which the Interstate Commerce Act, both Parts I and II, sought to achieve.

It should be borne in mind that each case involved the reasonableness of rates, which the Commission was, by the Congress and the Act, specifically empowered and directed to determine and establish, and what was sought to be questioned or re-evaluated in effect was the reasonableness of action *on the part of the Commission.*

The Court in both cases pointed out, in answer to contrary arguments based on the common law, that any common law causes of action against carriers for the recovery of unreasonable charges must necessarily be superseded and abolished since this necessarily involved the determination of what was and what wasn't a reasonable rate, and the statutory scheme gave this particular power of determination exclusively to the Commission.

These decisions pertain to a specific and clearly defined sector of carrier regulation.

The Court of Appeals decision herein has broadened the rules in those cases, and their consequent application, to exclude from the court's jurisdiction over *any* cause by a shipper against a motor common carrier involving *any* of the duties enunciated in Section 216(b) and (d), [49 U. S. C. A., Secs. 316(b) and (d)], where there is presented for determination *any* question of reasonableness, whether of action on the part of the Commission, a carrier, a carrier's agents or employees, a shipper, or whomsoever.

This is the literal holding of the Court of Appeals below.

We believe that this application of the rule in *T. I. M. E., Inc. v. United States, supra,* beyond the limited area of rate determination to cases involving the duty of service is, in itself, a major and unwarranted extension of that rule (see *Riss v. Association of American Railroads* (1959, D. C.), 178 Fed. Supp. 438). But the decision goes much further, for, if the matter is thought through, it will readily be seen that under this rationale, no shipper could sue a motor common carrier in any court on *any* basis for the reason that no carrier would lack the ingenuity to raise and present for determination at least one pertinent issue involving a determination of the reasonableness or unreasonableness of action on the part of some person or entity in the cause, and arising from or referrable to the duties enunciated in the subject sections.

A few examples will illustrate. It has been generally accepted that shippers continue to enjoy a right of action to recover overcharges from motor common carriers: that is to say, charges at rates in excess of those published in filed and posted tariffs applicable to the particular shipment. *Fawley Motor Lines v. Cavalier Poultry Corp.* (1956), 235 F. 2d 416; *United States v. Yale Transport* (1960), 184 Fed. Supp. 42. Congress assumed such a right to exist and evidently assumed the fact to be so well settled as to require no specific mention by it, since the Congress incorporated in the Motor Carrier Act provisions fixing and affecting the period of limitations within which such suits might be brought, but never felt it necessary elsewhere in the

Act to enunciate or spell out the basic right of action or specifically bestow jurisdiction over such causes on the Federal Courts. Motor Carrier Act, Section 204a(2) *et seq.* [49 U. S. C. A., Sec. 304a(2)].

This would seem to carry with it jurisdiction in the courts to determine which of the lawfully posted tariffs was applicable in the circumstances. See Motor Carrier Act Section 204a(5) [49 U. S. C. A., Sec. 304a(5)].

Nevertheless, under the rule announced below, a carrier can defeat such an action merely by alleging in defense that the charges were made in accordance with the rates posted in a tariff *different* from that alleged to be applicable and that the charges were, therefore *reasonable*. The mere assertion, it appears, is sufficient to defeat jurisdiction and deprive the shipper of recovery. *Hewitt-Robins v. Eastern Freightways* (1961, 2nd Cir.), 293 F. 2d 205 (Certiorari granted, 368 U. S. 915).

We can apply the same rationale to a shipper's action against a carrier for damage to goods in transit. The duty of a motor common carrier to render safe, effective and adequate service certainly has its roots in the same sections of the Motor Carrier Act involved in the cases at bar. The same considerations above described relative to actions for overcharges are equally applicable to actions for damage to goods in transit, or so it would seem if the specific portions of the Motor Carrier Act dealing therewith are considered. See 49 U. S. C. A. Section 319.

Nevertheless, a carrier sued by a shipper for damage to goods in transit would only need, under the rationale of the opinion below, to allege in defense that it acted reasonably under the circumstances and the shipper's action would fall completely for lack of jurisdiction in any court to determine such an issue.

The same argument may be fashioned in any action brought to enforce against a carrier any portion of its contract of carriage or for breach of any of its duties in respect thereof.

Similarly, there is nothing in the language of the court below to restrict its rationale to cases involving causes of action sounding essentially in contract. Causes of action in tort for personal injuries suffered as a consequence of a motor carrier's negligence would certainly be subject to the same rationale: "the shipper acted reasonably under the circumstances". The duty of reasonable care is fundamental to every such action, and again the escape hatch created by the opinion below is presented to the carriers.

We believe it is quite apparent from the foregoing that a host of consequences, neither foreseen nor intended by the majority of this Court in arriving at its decision in *T.I.M.E., Inc. v. United States, supra,* will certainly ensue unless certiorari is granted to review the decision below, to correct this unwarranted and potentially most harmful extension of the rule in that case.

The Opinion of the Court of Appeals Below Has Decided (Erroneously, We Submit) Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.

From what we have said before, it will be apparent that the instant case presents a number of important questions of federal law which have not been but should be decided by this court. Underlying the specific holding in the Court of Appeal's opinion is the question whether the Motor Carrier Act in effect clothed all federally certificated motor common carriers with immunity from court suits for damages of virtually any kind by restricting jurisdiction over such matters to the Commission (which has no power to award damages in respect of motor carriers).

As we have pointed out above, this question was answered by this court in *T.I.M.E., Inc. v. United States, supra*, as to actions which attempted to question rates already declared, in effect, to be reasonable by the Commission. The extent to which that rule has here been extended, by itself, indicates the necessity for further expression on the matter by this court as well as an expression of which, if any, causes of action survived the passage of the Motor Carrier Act. We do not labor this point at further length, for we believe that the court has already recognized the importance of this question by its action in granting the petition for certiorari to review the decision of the Court of Appeals for the 2nd Circuit in the case of *Hewitt-Robins v. Eastern Freightways, supra.*

The question, it seems apparent, is of immense importance to the nation's transportation industry as well

as those industries served by it for, in the present uncertain state of the law, a shipper is completely at the mercy of chance and the carriers for it cannot know whether it has a remedy at all, or if it does, where it may be presented or what relief may be had. It seems quite clear that if the decision herein is permitted to stand, the shipper will at least know to a reasonable certainty that he is without prospect of redress, without practical hope of compensation for loss by way of damages against the carrier, no matter what the offense. Clearly this situation was never intended by Congress to follow from its enactment of Part II of the Interstate Commerce Act and this court should so declare.

We do not here attempt to argue the merits of this point or set forth the authorities which compel a reversal of this holding. We attempt, merely, to define the question, its importance and the compelling need for its resolution by this court.

Should this court review the opinion of the court below and determine that a shipper does have a right of action for damages in the courts against a motor carrier for refusal to serve (as, we submit, it must) then another question of equal range, importance and impact on the nation's transportation industry and its business community is presented:

> To what extent is the carrier's duty to serve and the shipper's right of action for damages against the carrier for failure to serve affected by the circumstance that the refusal or failure was occasioned by the existence of a picket line at the shipper's place of business.

There are numerous decisions (not of this court) which hold or necessarily imply that such a circumstance does not affect the Federal Court's jurisdiction to hear and determine such a cause.

Meier & Pohlman v. Gibbons, supra;

Merchandise Warehouse Company v. ABC Freight Forwarding Corp., supra;

Quaker City Motor Parts Co. v. Interstate Motor Freight System, supra;

Minneapolis, etc., Railway v. Pacific Gamble Robinson Co., supra.

Certain *per curiam* decisions of this court are sometimes read as implying a contrary rule and holding to the effect that the mere presence of a picket line would relegate the entire matter to the exclusive province of the National Labor Relations Board (hereinafter referred to simply as "Board") regardless of the nature of the case, the context of the controversy, the parties involved, the relief sought or the circumstances attending or compelling the failure or refusal to serve, as was urged below by appellees.

General Drivers, etc. v. American Tobacco Co. (1959), 348 U. S. 978, 99 L. Ed. 762, 75 S. Ct. 569;

Teamsters v. Kerrigan Iron Works (1957), 353 U. S. 968, 1 L. Ed. 2d 1133, 77 S. Ct. 1005 (reversing 296 S. W. 2d 379);

McCrary, et al. v. Aladdin Radio Industries, Inc. (1957), 355 U. S. 8, 2 L. Ed. 2d 22, 78 S. Ct. 12 (remanding 298 S. W. 2d 770);

Bogle v. Jakes Foundry Co. (1960), 362 U. S. 401, 4 L. Ed. 864, 80 S. Ct. 12 (reversing in part 329 S. W. 2d 364).

These decisions were all in actions involving injunctive relief or citations for contempt or both and were all concerned with the rights of union defendants or individual defendant union officers, agents, employees or members.

In the causes at bar, the only defendants involved are carrier entities and the only relief sought is money damages against these defendants.

The instant case, therefore presents to this court for the first time the possibility of determining, without regard to extraneous matters and issues, the question of a Federal Court's jurisdiction to determine a shipper's right and a common carrier's duties in respect of one another in this critical situation.

The uncertainty of the law in this same situation, the need for its clarification as well as the dilemma in which shipper and carrier alike presently find themselves is well summarized by one writer, writing in both the Transportation Journal and the Labor Law Journal. See Labor Law Journal (C. C. H.) April 1962, "Carrier Service and the Picket Line: A Dilemma", page 301; Transportation Journal (American Society of Traffic and Transportation), Volume 1, No. 3, Spring 1962, "Carrier Service and the Picket Line," page 14.

Conclusion.

We believe it is evident from the foregoing that the circumstances of the within causes, the importance of the questions involved, the uncertain state of the law on the subject matter (an uncertainty which has been compounded by the opinion below), compel the granting of the within Petition and the issuance of the Writ, as prayed.

Respectfully submitted,

HILL, FARRER & BURRILL,
By CARL M. GOULD,
Attorneys for Petitioner.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Pensick & Gordon, Inc., Appellant, vs. California Motor Express, *et al.*, Appellees. No. 17,235.

Pensick & Gordon, Inc., a California corporation, Appellant, vs. California Motor Express, Limited, a corporation, *et al.*, Appellees. No. 17,380. April 13, 1962.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Jertberg, Circuit Judges; and Pence, District Judge.

Pence, District Judge:

This is an action for money damages brought by shipper against several motor common carrier defendants. The shipper (Appellant), in its original complaint (App. No. 17235) alleged the breach by each of the common carriers (Appellees) of their statutory duty to serve the appellant under the Motor Carrier Act (hereinafter referred to as "MCA"), part II of the Interstate Commerce Act, Section 216 (b) and (d), (49 U. S. C. A., Sections 316 (b) and (d)).[1] The

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[1]Section 216 of the MCA (49 U. S. C. A. §316) reads, in pertinent part, as follows:

"(b). It shall be the duty of every common carrier of property by motor vehicle to provide . . . adequate service, to establish . . . just and reasonable . . . practices relating . . . to the manner and method of delivering property for transportation . . .", and "(d). It shall be unlawful for any common carrier by motor vehicle . . . to subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage."

breach alleged was failure of the appellees to pick up and make delivery of goods at appellant's place of business, upon reasonable terms and without unjust discrimination.

In the original complaint, appellant asserted jurisdiction as to all appellees under 28 U.S.C.A. 1337, on the theory that the MCA gave a shipper the right under the Commerce clause to bring an action for damages in the United States District Court for breach by motor common carriers of their statutory duty to serve shippers and to serve without discrimination. The District Court, relying on Consolidated Freightways v. United Trucklines, (9 Cir., 1954), 216 F2d 543, decided that it did not have jurisdiction to hear and determine the controversy because the MCA does not provide any private remedy for a violation of any of its provisions, from which decision the appeal in No. 17235 was taken.

Appellant filed an amended complaint, again asserting jurisdiction lay in the District Court as to all appellees by virtue of the same 28 U.S.C.A. 1337, and also asserted jurisdiction on the premise that there exists a common law right of court action to enforce the common law duty of common carriers to serve and to serve without discrimination, apart from the statute, which common law rights survived the passage of the MCA, and that since diversity existed as to some of the appellees, jurisdiction lay in the District Court by virtue of 28 U.S.C.A. 1332.

Answers, as well as affidavits filed by all parties clearly showed that the failure to serve and the discrimination complained against resulted from the re-

fusal of appellees' unionized drivers to cross a picket line thrown up around appellant's place of business by appellant's employees as a result of a strike at appellant's plant. In determining the existence or non-existence of the requisite jurisdictional facts, the District Court properly inquired into and weighed all answers and affidavits. *Williams v. Minnesota Mining and Manufacturing Company*, 14 FRD 1, 4-8, SDCal. 1953, and *Ramirez and Feraud Chili Company v. Las Palmas Food Company*, 146 F.Supp. 594, AFFD, 245 F2d 874 (9 Cir. 1957), Cert. Den. 355 US 927, 1958.

From a ruling by the District Court that still it was without jurisdiction to try appellant's amended complaint, a second appeal, No. 17380, was taken. Both appeals, No. 17235 and No. 17380, were joined for the purpose of argument and disposition.

Appellant's basic contentions are that it, as a shipper, has invoked the common law duty of a common carrier to serve; that the shipper's historic right of action for breach of that duty is in no way inconsistent with any power exclusively conferred upon the Interstate Commerce Commission under the MCA; and that the shipper's cause of action continues in dual form both as a common law right under the savings clause of the Act, 216 (j) (49 U.S.C.A. 316 (j)) as well as the statutory sanctions of Section 216 (b) and (d).

Since the facts as shown by the complaints, answers and affidavits clearly demonstrate that the alleged breach of duty of service arose out of the failure of the defendants to serve because of appellant's own labor dispute and appellees' employees' refusal to cross the appellant's union's picket line at appellant's plant,

the alleged breach, by the very nature of those facts, depends upon the element of reasonableness or unreasonableness of the acts of appellees' employees in so refusing to cross the picket line. This, per se, demands the factual determination as to whether or not the carrier failed to provide reasonable service without unjust discrimination, as delineated in part II of the MCA, Sections 216 (b) and (d). The question of jurisdiction is thereby brought squarely within the purview of *T.I.M.E. v. United States,* 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904, and *Consolidated Freightways v. United Truck Lines, supra,* and the rationale of those cases is directly applicable here.

The legislative history of the MCA is fully covered in *T.I.M.E., supra,* and *Consolidated Freightways v. United Truck Lines,* 216 Ore. 516, 330 P. 2d 522, cert. den. 355 U. S. 1001. It is clear from that history that the MCA undertook to set forth a comprehensive and all-inclusive scheme for the Federal regulation of common motor carriers. As heretofore indicated, Section 216 as it applies to the instant case, provides that carriers may not unreasonably refuse to serve or unjustly discriminate against any shipper. Therefore, in every case in which the problem of carrier compliance with the service or discrimination clauses of Section 216 of the MCA is raised, there must be a determination by the Commission of whether there has been a disservice or discrimination with respect to treatment of shippers, and whether such treatment was un-

reasonable or unjustly discriminatory. "Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the National Transportation Policy." *Carpenters' Union v. Labor Board*, 357 U. S. 93, 110, and only the Commission can answer that question.

Under the statutory scheme of the MCA, only the ICC can decide in the first instance whether any alleged act of disservice on the part of the appellees was unreasonable or unjustly discriminatory and the courts are without authority to make such a determination. If, under the saving clause, §216 (j) of the MCA, no common law remedy is saved to a shipper, aggrieved by an unreasonable rate, which was held in T.I.M.E. to be an administrative question, no such remedy is saved to a shipper aggrieved by unreasonable disservice or unjust discrimination, which also is an administrative question, as held in *Carpenters' Union, v. Labor Board, supra*. Whenever, under a claim by a shipper that a motor common carrier has failed to serve, there arises a *genuine* issue as to the reasonableness of such disservice or unjustness of such discrimination, there exists no remedy in the courts available to the shipper, for the crucial questions of reasonableness or unjustness cannot be decided by the courts.

It is not necessary for us to decide, and we do not so decide, that no common law actions have survived the

MCA, but where, as appellant recognized here,[2] the real issue is whether or not the carrier has failed to provide service to a shipper on reasonable terms and without unjust discrimination, the District Court is without jurisdiction to hear and determine it.

Having decided these appeals on the above grounds, we do not find it necessary to pass upon the merits of appellees' affirmative defense that the District Court was without jurisdiction because the controversy between the parties raised issues which are within the exclusive primary jurisdiction of the National Labor Relations Board.

As to each appeal, we hold the District Court correctly dismissed each complaint for lack of jurisdiction.

Affirmed.

(Endorsed) Opinion Filed April 13, 1962.

Frank H. Schmid, Clerk.

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[2] "The gist of the action is the failure of the Defendants individually, at specified times, to provide service to the Plaintiff upon reasonable terms and without discrimination."
Ap. No. 17235, Apnt. Op. Br., p. 1.

"This cause is the companion to that in Ap. No. 17235. . . . The theories of the first and second causes are identical."
Ap. No. 17380, Apnt. Op. Br., p. 1, 2.

"Sec. 216(b) and (d) of the Motor Carrier Act . . . contains . . . a statutory embodiment of this . . . (common law duty of a common carrier to serve).

"The commission has further refined the general standards laid down by the statute . . .

"The foregoing are the standards by which the conduct of the Appellees must be measured, and this Appellant does not question the standards; it seeks only to establish a failure to conform to them . . ."
Aps. No. 17235, No. 17380, Apnt. Reply Br., p. 3.

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IN THE

Supreme Court of the United States

October Term, 1962.
No. 222

Case No. 17235

PENSICK & GORDON, INC., *Appellant,*

vs.

CALIFORNIA MOTOR EXPRESS, *et al.,* *Appellees.*

Case No. 17380

PENSICK & GORDON, INC., a California corporation, *Appellant,*

vs.

CALIFORNIA MOTOR EXPRESS, LIMITED, a corporation, *et al.,* *Appellees.*

Brief for the Respondents California Motor Express, Ltd., Delta Lines, Inc., Desert Express, Merchants Express of California, Valley Motor Lines, Inc., and Western Truck Lines, Ltd., Appellees in No. 17235, and

Braswell Motor Freight Lines, Inc., Hopper Truck Lines, Illinois-California Express, Inc., and Denver-Chicago Motor Trucking Co., Inc., Appellees in No. 17380,

In Reply to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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October Term, 1962.

No. 222

Case No. 17235

PENSICK & GORDON, INC., *Appellant,*

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vs.

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Brief for the Respondents California Motor Express, Ltd., Delta Lines, Inc., Desert Express, Merchants Express of California, Valley Motor Lines, Inc., and Western Truck Lines, Ltd., Appellees in No. 17235, and

Braswell Motor Freight Lines, Inc., Hopper Truck Lines, Illinois-California Express, Inc., and Denver-Chicago Motor Trucking Co., Inc., Appellees in No. 17380,

In Reply to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit, copy of which is appended to the Petition as an appendix is officially reported at 302 F. 2d 391. The opinion of the District Court dismissing the complaint in No. 17235 is unreported. Copy of said opinion of the District Court is appended hereto as Appendix A. There is no opinion of the District Court in No. 17380.

Questions Presented.

These Respondents are dissatisfied with the Petitioner's presentation of the "Questions Presented." Notwitstanding the fact that the Court of Appeal expressly stated its decision should not be so interpreted, Petitioner contends the Court of Appeals has decided the issue of immunity of federally certificated carriers to all kinds of damage suits by shippers and the jurisdictional questions raised by these and other Respondents in the courts below arising out of the labor aspects of the controversy.

The substantive issue which the petitioner sought to raise in this case was whether or not the respondent motor common carriers had failed to provide service to petitioner as a shipper on reasonable terms and without unjust discrimination. The sole issue decided by the Court of Appeals was that the District Court did not have jurisdiction to hear and determine this controversy because of the provisions of the Interstate Commerce Act, Part II (49 U. S. C. §§301-327).

Respondents submit that the only questions here presented are these:

1. Do Sections 216(b) and (d) of the Interstate Commerce Act, Part II (49 U. S. C. §§316(b) and (d)) establish a private legal right in a shipper, justiciable in the District Court, for reparation of injury allegedly resulting from past unreasonable and unjust discrimination in service by motor common carriers in interstate commerce?

2. Did the enactment of the Interstate Commerce Act, Part II (49 U. S. C. §§301-327), extinguish any judicially enforceable legal right which a shipper may have had to recover damages for past unreasonable and unjust discrimination in service by motor common carriers in interstate commerce?

Statutes Involved.

Under these Respondents' view of the questions presented the Interstate Commerce Act, Part II (49 U. S. C. §§301-327) in its entirety is involved. The provisions thereof most directly relevant are Sections 204(c), 204a(2), 216(b), 216(d), 216(e), 216(j) and 219 (49 U. S. C. §§304(c), 304a(2), 316(b), 316(d), 316(e), 316(j) and 319). The sections specifically designated are reproduced in Appendix B hereof.

Statement of the Case.

In its basic outline Petitioner's "Statement of the Case" is essentially accurate. There are, however, certain additional facts which should be noted to place the issues raised by the petition in proper perspective.

The gravamen of Petitioner's action against all of these Respondents is the alleged unjust and unreasonable character of claimed discrimination in motor common carrier service. Petitioner's pleadings assert breach of duty in general terms. However, from affidavits filed by the several Respondents in support of their motions to dismiss it appears that the period during which it is alleged the failures in carrier service occurred coincided exactly with a period during which the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers (hereinafter called "Teamsters") was maintaining a picket line at Petitioner's place of business related to a then existing labor controversy between Petitioner and the Teamsters at Petitioner's business location [1. Tr. 38-39, 46; 2. Tr. 88-89].[1] During the period involved driver employees of these Respondents, and other carriers, members of the Teamsters union, declined to pass from the public streets through the picket line to accomplish pickup or delivery at the loading platform on Petitioner's premises [1. Tr. 28-30, 40-41, 65-66; 2. Tr. 78-79, 80-82]. All other aspects of carrier service were performed [1. Tr. 40-41, 61, 62-64; 2. Tr. 78-82].

In both the original and amended complaint jurisdiction was asserted as to all of these Respondents under 28 U. S. C. §1337 on the premise that the Interstate Commerce Act, Part II, Sections 216(b) and (d) (49 U. S. C. §§316(b)(d)) authorize a shipper to bring a court action for damages for past unjust and unreasonable discriminations in service. Jurisdiction was claimed

[1]The references "1. Tr." and "2. Tr." refer to the records on appeal in Case No. 17235 and 17380 respectively.

as to the Respondents named in the amended complaint on the additional grounds of diversity under 28 U. S. C. §1332 on the premise that a right of court action for damages for past unjust and unreasonable discriminations in service exists apart from statute.

Although additional grounds were urged before the Court of Appeals in support of the order of the District Court dismissing the action as to all of these Respondents, the decision of the Court of Appeals was based upon the ground that the Interstate Commerce Act, Part II sets forth a comprehensive and all-inclusive scheme for the federal regulation of common motor carriers; that under the statutory scheme of this Act only the Interstate Commerce Commission can decide in the first instance whether any alleged act of disservice on the part of carriers was unreasonable or unjustly discriminatory and that courts are without authority to make such determinations; that the determination as to whether or not disservice by carriers is unreasonable or unjustly discriminatory is an administrative question and that a remedy in courts for past conduct alleged to be unreasonable and unjust does not exist under the statutory scheme of the Interstate Commerce Act. The Court of Appeals expressly declined to consider or decide what common law actions, if any, may have survived the passage of the Interstate Commerce Act. It also expressly declined to consider or pass upon the merits of the contention of the Respondents that the District Court was without jurisdiction because the controversy between the parties raised issues which are within the exclusive primary jurisdiction of the National Labor Relations Board.

ARGUMENT.

The Decision of the Court of Appeals Is Predicated Upon and Is in Full Conformity With Applicable Decisions of This Court Dealing With the Question Involved.

The question presented to the Court of Appeals was whether or not, under the statutory scheme of the Interstate Commerce Act, Part II the District Court had jurisdiction to entertain an action by a shipper seeking reparation for past unreasonable and unjust discriminations in service by motor common carriers. The Court of Appeals has decided the District Court did not have jurisdiction to entertain and decide such litigation. Its decision is predicated upon the decision of this Court in *T.I.M.E. Inc. v. United States*, 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904 (1959), *Local 1976, U. B. Carpenters, etc. v. N. L. R. B.*, 357 U. S. 93, 2 L. Ed. 2d 1186, 78 S. Ct. 1011 (1958). Also mentioned were *Consolidated Freightways, Inc. v. United Truck Lines, Inc.*, 216 F. 2d 543 (CA 9, 1954; Cert. Den. 349 U. S. 905) and a companion case by the same name decided by the Oregon Supreme Court, 216 Ore. 515, 330 P. 2d 522 (Cert. Den. 355 U. S. 1001).

In *T.I.M.E. Inc. v. United States, supra*, this Court was called up to decide whether or not, under the Interstate Commerce Act, Part II, a shipper of goods by certificated motor carrier could challenge in post shipment litigation the reasonableness of a carrier's charges which were made in accordance with the tariff governing the shipment. There, as in the instant case, the parties contending for the jurisdiction of the District Court urged (a) that a cause of action in a shipper injured by violation of the duties prescribed in §§216(b)

and (d) of the Interstate Commerce Act, Part II (49 U. S. C. §316(b), (d)) was necessarily implied under said Act; and (b) that even if such Act did not grant the right, it must at least be read to preserve a pre-existing common law right of the same kind. In the *T.I.M.E., Inc.* case the the damages claimed arose from the alleged unreasonableness of the charges made by the carrier for services performed. Noting that provisions in Part I and III of the Interstate Commerce Act expressly preserving a right of action by a shipper for reparation of injuries sustained by reason of past unlawful action by a carrier were omitted in the enactment of Part II and that attempts at varying times subsequent to the first enactment of the Motor Carrier Act to insert such provisions therein have also been unsuccessful, this Court held that the Interstate Commerce Act past Part II did not establish a justiciable legal right in a shipper to recover or resist past motor carrier charges alleged to have been unreasonable. In *T.I.M.E., Inc., supra,* this Court also held a judicial remedy in respect of unreasonable past rates did not survive the passage of the Interstate Commerce Act, Part II.

Petitioner urges the holding of this Court in *T.I.M.E., Inc. v. United States, supra,* must be restricted to the specific fact situation there presented, and that the rules as to jurisdiction therein stated are not here applicable because the unjust discrimination charged relates to facilities rather than to price. The contention is not tenable.

As the Court of Appeals noted, relying on the holding of this Court in *Local 1976, U. B. Carpenters, etc., v. N. L. R. B.*, 357 U. S. 93, 2 L. Ed. 2d 1186, 78 S. Ct. 1011 (1958), the question of unreasonableness and un-

just discrimination in service is an administrative question calling for a determination of the carrier's duty in the framework of the National Transportation Policy, a subject within the exclusive competence of the Interstate Commerce Commission. Discriminations in price and in facilities are but the two sides of the same coin. On the jurisdictional question how the discrimination arises is not important. The significant consideration is the Congressional intent as to the forum in which the question of reasonableness of carrier conduct in its primary service relationships with shippers is to be determined.

In cases arising under Part I of the Interstate Commerce Act this Court has consistently held, whether the alleged discrimination of carrier conduct relates to facilities furnished or the price charged, the question of justness and reasonableness is one within the exclusive competence of the Interstate Commerce Commission.

Armour & Co. v. Alton R.R. Co., 312 U. S. 195, 85 L. Ed. 771, 61 S. Ct. 498 (1941);

Loomis v. Lehigh Valley Railroad Co., 240 U. S. 43, 60 L. Ed. 517 (1916);

Midland Valley Railroad Co. v. Barkley, 276 U. S. 482, 72 L. Ed. 664, 48 S. Ct. 342 (1928).

Thus, the conclusion of the Court of Appeals that the question of jurisdiction to decide issues of reasonableness in service facilities furnished is the same as that presented when the question is reasonableness in the charges made is simply recognition of a rule long established by this Court.

The statutory statement of the carrier's duty to act without discrimination both as to price and as to facilities furnished is contained in the same sections of Part II, of the Interstate Commerce Act and is expressed in substantially identical language.

> *Interstate Commerce Act, Part II*, §216(b)(d) (49 U. S. C. §216(b)(d)).

It is inconceivable that Congress would have so grouped these declarations of carrier obligations had it intended the context to be a "criterion of administrative application" as to reasonableness of rates and a declaration of "justiciable legal right" when the issue is reasonableness in the character of facilities provided.

Petitioner suggests that the action of this Court in granting a writ of certiorari in the case of *Hewitt-Robbins, Inc. v. Eastern Freight Ways, Inc.*, 293 F. 2d 205 (C. A. 2, 1962) is an indication that the Court of Appeals for the Ninth Circuit has applied *T.I.M.E, Inc. v. United States, supra*, improperly in the present case. In *Hewitt-Robbins, Inc., supra*, the shipper had tendered to the carrier numerous unrouted shipments for movement between two points, both of which were in the same state. The carrier, having both intrastate and interstate routes had handled the traffic via the longer and more expensive interstate route. The shipper sought to recover the difference between the charges via the intrastate and the interstate routes on the premise that the routing via the interstate route constituted an unreasonable routing practice in violation of 49 U. S. C. §316. The Court of Appeals, one judge dissenting, sustained an order of the District Court dismissing the action upon the premise that the substantive issue was

the reasonableness of the routing practices and that under the holding in *T.I.M.E., Inc. v. United States, supra,* the District Court was without jurisdiction to decide this substantive issue. In the dissenting opinion in *Hewitt-Robbins,* the suggestion is made that the contract between the parties was for intrastate carriage of goods, and that the substantive issue was whether the carrier could unilaterally convert the transportation into an interstate movement in the face of the contractual obligation. The substantive issue in *Hewitt-Robbins* is thus open to two possible interpretations. In one posture of the case, the question of reasonableness of interstate transportation practices would be presented and in the other it would not. The issue was not, therefore, as petitioner here suggests, the question of the limitation of the rule in the *T.I.M.E., Inc.* case to questions involving reasonableness of charges as compared with reasonableness of service, both of which are regulated by, Interstate Commerce Act, Part II, §216, but rather whether the question of reasonableness and unjust discrimination is involved in the case at all. No such situation is here presented. In the instant case, appellant has conceded from the outset that the ultimate substantive issue in the controversy is whether or not the carrier has failed to provide service on reasonable terms and without unjust discrimination.

The Decision of the Court of Appeals Below Is in No Way in Conflict With Decisions of Courts of Appeals in Different Circuits.

In support of the petition, it is contended that the decision of the Court of Appeals in this case is in conflict with two decisions of the Court of Appeals for the Eighth Circuit. The cases to which reference is made are:

Meier & Pohlman Furniture Co. v. Gibbons, 233 F. 2d 296 (CA 8, 1956), (Cert. Den. 352 U. S. 879);

Minneapolis, etc. Railway Co. v. Pacific Gamble-Robinson Co., 215 F. 2d 126 (CA 8, 1954).

The sole question decided by the Court of Appeals for the Ninth Circuit in the present case was the jurisdiction of the District Court to hear and determine the claim of Petitioner that it had been damaged by reason of past allegedly unreasonable and unjust discriminations in motor carrier service. Neither of the cases in the Eighth Circuit considered that issue. Both were decided prior to the decision of this Court in *T.I.M.E., Inc. v. United States, supra.*

Meier & Pohlman, supra, did involve a fact situation similar in many of its aspects to that described in the pleadings and affidavits in this case. However, the appeal in *Meier & Pohlman* was from a judgment on the merits in favor of the defendant carriers and, beyond prefunctory reference to 49 U. S. C. A. §§9 and 319 and 28 U. S. C. A. §§1331 and 1337, the subject of

jurisdiction was nowhere discussed. The Court of Appeals for the Eighth Circuit did state that until reasonableness of rules, regulations and tariffs of carriers has been determined by the Interstate Commerce Commission shippers may not maintain an action in court against a carrier based upon a claim of unreasonableness. This language is consistent, rather than inconsistent, with the interpretation placed upon the Interstate Commerce Act, Part II by the Court of Appeals for the Ninth Circuit in the present case wherein the question of jurisdiction was raised by the parties.

Minneapolis, etc. Railway Co. v. Pacific Gamble-Robinson Co., supra, was an action against a railroad subject to the Interstate Commerce Act, Part I. The present action, as it pertains to these Respondents, involves only Part II of said Act. As this Court noted in *T.I.M.E., Inc. v. United States, supra,* there is a significant difference between Part I and Part II of the Interstate Commerce Act in that Part I contains provisions expressly granting a right of shippers to bring actions in the District Court for reparations for past unreasonable conduct on the part of railroads whereas Part II regulating motor carriers contains no comparable provisions. Obviously in these circumstances, the decision of the Court of Appeals for the Eighth Circuit in *Minneapolis, etc. Railway Co. v. Pacific Gamble-Robinson Co., supra,* cannot possibly be construed as conflicting with the decisions of the Court of Appeals for the Ninth Circuit in the present case.

Petitioner also suggests that decisions of District Courts in *Merchandise Warehouse Company v. A.B.C. Freight Forwarding Co.,* 165 Fed. Supp. 67 (1958) and *Quaker State Motor Parts Co. v. Interstate Motor*

Freight, 148 Fed. Supp. 226 (1957), are conflicting with the conclusions reached by the Court of Appeals in the instant case. Inconsistency between decisions of District Courts and a decision of the Court of Appeals does not form a basis for granting a writ of certiorari.

Rules of the U. S. Supreme Court, Rule 19.1(b).

Further, in the two last cited cases, as in *Meier & Pohlman, supra*, mention of the subject of jurisdiction of the District Court to hear and determine the case was perfunctory. In neither case did the District Court consider the issues of statutory interpretation discussed both in *T.I.M.E., Inc. v. United States, supra* and by the Court of Appeals for the Ninth Circuit here.

The Decision of the Court of Appeals Raises No Questions of Federal Law Not Already Settled by This Court.

Petitioner views the decision of the Court of Appeals as placing in issue:

(a) The jurisdiction of courts in damage suits of "virtually any kind" brought against federally certificated carriers by shippers, and

(b) The question of the jurisdiction of federal courts to determine the respective rights of carriers and shippers in cases in which a failure in carrier service is the result of the existence of a picket line at shipper's place of business.

As the Court of Appeals noted in the concluding portions of its opinion, the sole issue decided was the jurisdiction of the District Court to hear and determine the issue as to whether or not the respondent motor carriers

had failed to provide service to a shipper on reasonable terms and without unjust discrimination. In reaching its conclusion that the District Court was without jurisdiction to proceed, the Court of Appeals considered only the issues raised under the Interstate Commerce Act, Part II, as applied to the substantive controversy presented. The Court of Appeals stated specifically it was declining to pass upon the question of District Court jurisdiction in any other fact situation, and that it was not deciding the issue as to whether or not the controversy raised issues within the exclusive primary jurisdiction of the National Labor Relations Board.

It is a usual situation for a Court of Appeals presented with several issues, each of which would be dispositive of the action, to rest its determination upon one such issue and to decline to pass upon the others. On review this Court has consistently restricted itself to the issues actually determined by the Court of Appeals. In those instances in which this Court has found the Court of Appeals erred in its conclusions on the issues decided the procedure has been to remand to the lower court for its determination of the issues not passed upon in the first instance.

Hess v. United States, 361 U. S. 314, 4 L. Ed. 2d 305, 80 S. Ct. 341 (1960);

Barr v. Matteo, 355 U. S. 171, 2 L. Ed. 2d 179, 78 S. Ct. 204 (1957);

Mitchell v. Di Mario Jewelry, Inc., 361 U. S. 288, 4 L. Ed. 2d 323, 80 S. Ct. 332 (1960);

Bank of America National Trust & Savings Association v. Parnell, 352 U. S. 29, 1 L. Ed. 2d 93, 77 S. Ct. 119 (1956).

It is a necessary correlary of these rules that matters not passed upon by the Court of Appeals cannot properly form the basis for the grant of a writ of certiorari.

Conclusion.

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RUSSELL & SCHUREMAN,

By THEODORE W. RUSSELL,

Attorney for Respondents California Motor Express, Ltd., Delta Lines, Inc., Desert Express, Merchants Express of California, Valley Motor Lines, Inc., and Western Truck Lines, Ltd., Appellees in No. 17235, and Braswell Motor Freight Lines, Inc., Hopper Truck Lines, Illinois-California Express, Inc., and Denver-Chicago Motor Trucking Co., Inc., Appellees in No. 17380

APPENDIX A.

ORDER DISMISSING ACTION

It appearing to the court that:

(1) jurisdiction of this court is invoked upon the ground of diversity of citizenship (28 U. S. C. A. 1332) and the Motor Carrier Act (49 U. S. C. A. sections 301 to 327), but diversity of citizenship does not appear from the record to exist;

(2) plaintiff asserts no claim or cause of action arising under an act of Congress, as the Motor Carrier Act does not provide any private remedy for a violation of any of its provisions. (Consolidated Freightways v. United Trucklines (CA 9) 216 F. 2 543).

It is Now Ordered that the action is dismissed and that this dismissal shall not operate as an adjudication on the merits (Federal Rules of Civil Procedure, 41(b)).

It Is Further Ordered that the plaintiff have 20 days from the date hereof to file an amended complaint if it be so advised.

It Is Further Ordered that the clerk of the court this day serve a copy of this order by United States mail upon the attorneys for each of the parties appearing in this action.

Dated: November 1st, 1960.

/s/ WM. M. BYRNE,
United States District Judge.

APPENDIX B.

Sections 204(c), 204a(2), 216(b), 216(d), 216(e), 216(j), and 219 [49 U. S. C. §§304(c), 304a(2), 316(b), 316(d), 316(e), 316(j), and 319] are set forth below.

Section 204(c) [49 U. S. C. §304(c)]:

"Upon complaint in writing to the Commission by any person, State Board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

Section 204a(2) [49 U. S. C. §304a(2)]:

"For recovery of overcharges, action at law shall be begun against common carriers by motor vehicle subject to this chapter within three years from the time the cause of action accrues, and not after, subject to paragraph (3) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice

in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice."

Section 216(b) [49 U. S. C. §316(b)]:

"It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce."

Section 216(d) [49 U. S. C. §316(d)]:

"All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic in any respect whatsoever; or to sub-

ject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 216(e) [49 U. S. C. §316(e)]:

"Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 217 of this title. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be ob-

served, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: *Provided, however*, That nothing in this chapter shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

Section 216(j) [49 U. S. C. §316(j)]:

"Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

Section 219 [49 U. S. C. §319]:

"The provisions of section 20(11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 222

PENSICK & GORDON, INC., a California corporation,
Petitioner,

vs.

CALIFORNIA MOTOR EXPRESS, LTD., a corporation, *et al.*,
Respondents.

Brief of Respondent T.I.M.E. Freight, Inc., a Corporation, in Opposition to Petition for Certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 222

PENSICK & GORDON, INC., a California corporation,
Petitioner,

vs.

CALIFORNIA MOTOR EXPRESS, LTD., a corporation, *et al.*,
Respondents.

Brief of Respondent T.I.M.E. Freight, Inc., a Corporation, in Opposition to Petition for Certiorari.

Statement as to Jurisdiction.

The jurisdiction of the Supreme Court of the United States arises by virtue of 28 U. S. C. A. §1254(1). The facts establishing such jurisdiction are set forth in the printed Transcript of Record in No. 17235 at page 94 and in No. 17380 at pages 192-193.[1] Both appeals were from orders of the District Court dismissing the action for want of jurisdiction and which orders were affirmed by judgment of the United States Court of Appeals dated April 13, 1962. The opinion of the Court of Appeals is printed and attached as Exhibit "A" to Appellant's Petition for a Writ of Certiorari and is reported at 302 F. 2d 391.

[1]Page references to the printed Transcript of Record in the first cause (No. 17235) will be preceded by the designation "1 Tr."; and in the second cause (No. 17380) by "2 Tr." Respondent T.I.M.E. Freight, Inc., may be referred to as "T.I.M.E."

Statement of the Case.

The action as it pertains to Respondent herein is one for damages for alleged breach of duty to Petitioner allegedly imposed upon it as a common carrier of property by motor vehicle pursuant to subdivisions (b) and (d) of §216 of the Interstate Commerce Act, 49 U. S. C. A. §316(b)(d) to make pick-up and delivery of goods at Petitioner's place of business upon reasonable terms and without unjust discrimination.[2]

When the cause was originally commenced, the action called for injunctive relief as well as damages. Hence, the District Court had before it Petitioner's verified Complaint and various affidavits submitted by Petitioner, this and other Respondents before the Court which evidenced the following:

(1) Petitioner, a shipper of toys throughout the various states of the United States, regularly called upon common carriers to pick up and deliver its merchandise. [1 Tr. 5, 6.]

(2) Respondent T.I.M.E. is a motor common carrier of property operating under Certificates of Public Convenience and Necessity, duly issued by the Interstate Commerce Commission, and is engaged in the carriage of general commodities in interstate commerce.

(3) Between October 12 and 18, 1960, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers (Teamsters' Union Local 986) maintained a picket line at Petitioner's place of business in connection with labor difficulties then existing

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[2]Hereafter, when mention is made of §216(b), (d), reference to the Interstate Commerce Act is intended unless the contrary is specifically indicated.

between said Union and Petitioner. [1 Tr. 46; 2 Tr. 88.]

(4) Driver employees of Respondent T.I.M.E. declined to pass through the picket line and perform pick-up or delivery at Petitioner's dock. [1 Tr. 28-30, 40-41, 65-66; 2 Tr. 78-79, 80-82.]

(5) Petitioner asserts the failure to pass through the picket line constitutes an unreasonable practice and is unjust discrimination in service, thus violative of §216(b)(d) of the Interstate Commerce Act and for which Petitioner is entitled to damages.

(6) The Court below held that since the breach arose out of the alleged failure of service caused by Petitioner's own labor dispute, and said breach depends upon the element of reasonableness or unreasonableness of the acts of Respondent's employees (in refusing to cross the picket line)—then this, *per se*, demands the factual determination as to whether or not the carrier failed to provide reasonable service without unjust discrimination as delineated in Part II of the Interstate Commerce Act, §§216(b), (d) (49 U. S. C. A. §§316(b), (d).)

The question of whether or not the District Court had jurisdiction to make such a determination was found by the court below to have come squarely within the periphery limits and purview of this Court's decision in *T.I.M.E. v. United States* (1959), 359 U. S. 464; 3 L. Ed. 2d 952, 79 S. Ct. 904, and by the lower court's decision in *Consolidated Freightways v. United Truck Lines*, 216 F. 2d 543 (9 Cir. 1954); cert. den. 349 U. S. 905 (1955) and the rationale of those cases were held to be directly applicable to the instant case.

Question Presented.

The sole question on appeal is whether the District Court has jurisdiction to hear and determine a controversy involving a shipper's claim for damages against motor common carriers arising out of the carriers' alleged unreasonable practice and alleged unjust discrimination in failing to render pickup and delivery service.

Petitioner asserts jurisdiction under 28 U. S. C. A. §1337 on the ground that the Interstate Commerce Act, Part II (49 U. S. C. §§301-27) expressly authorizes court action for damages for past unjust and unreasonable discrimination in service. Further, jurisdiction is asserted as to Respondent T.I.M.E. in No. 17380 on the ground that such action exists apart from statute and hence may be prosecuted in the District Court under 28 U. S. C. A. §1332 when diversity is demonstrated.

Respondent challenges both grounds of jurisdiction for the reasons and arguments in support thereof as follows.

ARGUMENT.

1. This Court and the United States Court of Appeals Have Held Squarely That There Is No Private Civil Remedy Available Against a Motor Carrier Cognizable in the District Court for Damages Incurred by Reason of Carrier Violation of the Provisions of §216 of the Interstate Commerce Act (49 U. S. C. A. §216).

Summary of the Argument.

Enactment of Part II of the Interstate Commerce Act evidenced determination by Congress to pre-empt control in the field of relationships between interstate motor carriers and shippers. Both this Court and the United States Court of Appeals for the Ninth Circuit have held that no private judicial action will lie for damages for breach by a carrier of the provisions of §§216(b) and (d) of the Interstate Commerce Act (sometimes referred to as the Motor Carrier Act). *T.I.M.E. Inc. v. United States, supra,* and *Consolidated Freightways v. United Trucklines, supra.*

Significantly, Part II contains no provisions expressly granting to a shipper a right to recover damages for unauthorized limitations or discrimination in service. The provisions of said Part II (49 U. S. C. A. §301, *et seq.*) delineate the exclusive remedies for breach of carrier duty established by the Act (§216) and such remedies do not include a private civil action by the shipper against the carrier for damages in the District Court.

1.1 The Decision of This Court and the Court Below Have Already Ruled Adversely to Petitioner on Its Claim That a District Court Had Jurisdiction Under an Act of Congress. Petitioner Bases Its Argument as to Jurisdiction Under 28 U. S. C. A. §1337 as Coming Within the Orbit of §§216(b) and (d) of the Interstate Commerce Act. Neither of Said Sections Authorizes Expressly or Inferentially a Justiciable Legal Right in a Private Shipper for Alleged Failure of Performance by a Carrier of the Requirements as Specified in Said Sections.

The statutory interpretation of the aforesaid sections as urged by Petitioner has been considered and rejected both by this Court and the United States Court of Appeals.

In *T.I.M.E. v. United States,* the Government, as a shipper of goods in interstate commerce, asserted as a defense in post-shipment litigation, the reasonableness of the motor carriers' charges made in accordance with tariffs governing the shipments, as well as an additional defense that the Act at least preserved the pre-existing common law right to recover from a carrier for unreasonable charges paid under protest. The Government conceded that irrespective of the right asserted by it as a defense, the determination of reasonableness or unreasonableness lay within the orbit of Interstate Commerce Commission jurisdiction. The two questions therein involved are identical to the instant litigation: (a) whether a judicially enforceable right arises under the Act; and, if not (b) whether the common law rights, if any, were preserved despite the passage of the Act. This Court concluded in said case, that

"the very provisions of Part I and their counterparts in Part III, which give right of action to shippers against carriers for damages incurred by carrier violations of the Act, and provide the mechanics for the enforcement of that right are conspicuously absent from the Motor Carrier Act. Thus, whereas §8 of Part I provides that '. . . any common carriers subject to the provisions of this chapter (who) shall do . . . any act . . . . in this chapter . . . declared to be unlawful . . . shall be liable to the person or persons injured thereby for the full amount of the damages sustained . . .'. Part II has no comparable provision. Again, whereas §9 of Part I gives the injured shipper the right to sue in the I.C.C. or in the Federal District Court, Part II contains no comparable provisions." (359 U. S. at 466-471).

Then again this Court opined at page 471:

"We find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which establish that right in Part I were wholly omitted in the Motor Carrier Act" (p. 471).

In the *Consolidated Freightways* case, in discussing the same subject, the following language was used by the Ninth Circuit Court below:

"In contrast with Part I, Part II is silent as to any private remedy for a violation of any of its provisions. This omission is significant, and persuades us that Part II is to be regarded as wholly independent legislative enactment in which Congress deliberately elected to provide no remedies

for violation of any of its provisions other than those carefully spelled out in Part II itself." (215 F. 2d at 545.)

The standard of "reasonableness" as applied in the *T.I.M.E.* case as to tariff charges, applies equally to the obligation to provide service and Petitioner respectfully submits that §§216(b) and (d) cannot have one meaning in reference to discrimination in rates and another as to discrimination in service. The standards of reasonableness as established by the sections of the Act create the criteria for administrative application and not justiciable legal rights. *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U. S. 246, 251; 359 U. S. at 469-470.

Even the Interstate Commerce Commission itself has recognized the absence of a private remedy for violation of the Act and upon two occasions recommended amendatory legislation has been rejected by Congress. (*T.I.M.E.* case *supra*, 359 U. S. at 471.)

It is to be noted that in a recent decision, the United States Court of Appeals for the Second Circuit, held that the rule announced in the *T.I.M.E* case is equally applicable where the question in issue is reasonableness of practices of motor carriers as when the question is reasonableness of rates. *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 293 F. 2d 205 (C. A. 2, 1961). (Cert. granted, 368 U. S. 915.)

2. Enactment of Part II of the Interstate Commerce Act, §216(b), (d) Thereof Destroyed Any Common Law Action Which May Have Theretofore Existed for Failure of a Carrier to Provide Reasonable Service Without Unjust Discrimination and/or Prejudice; Remedies Provided for in the Interstate Commerce Act Are Exclusive of All Other Remedies.

Summary of the Argument.

The Interstate Commerce Act, Part II, precludes rights or remedies inconsistent with §216. The requirement of carrier conduct as prescribed in the aforesaid Section is that the same shall be reasonable and non-discriminatory with respect to all matters affecting transportation and as to all persons, places and traffic. The Interstate Commerce Act, as Congress intended undertook to set forth a comprehensive and all-inclusive scheme for the Federal regulation of common motor carriers, and the Interstate Commerce Commission is vested with the exclusive competence to determine whether or not carrier conduct is reasonable and non-discriminatory in particular instances. Adjudication of the question herein involved by the District Court would necessarily come within the periphery limits of judicial determination as to whether or not carrier conduct was reasonable and non-discriminatory within §216. Hence, such a determination would be inconsistent with the statutory plan and thus by virtue of pre-emption on the part of Congress in the field the cause and remedy were correspondingly extinguished by the statutory enactment.

2.1 The Comprehensive and All-Inclusive Regulatory Scheme Contained in Part II Precludes Survivial of the Common Law Action Which Petitioner Seeks to Assert.

In the *T.I.M.E* case, *supra,* the shipper therein conceded that primary jurisdiction to adjudicate the question of reasonableness rested with the Interstate Commerce Commission and postulated the contention that *after* the Commission found conduct unreasonable, it then should be allowed to recover damages in the judicial action for the wrong so *determined by the Commission to exist by virtue of the general language in §216(j) of the Interstate Commerce Act providing that nothing in §216 ". . . shall be held to extinguish any remedy or right of action not inconsistent therewith."* 46 U. S. C. A. §316(j).

In rejecting this contention, this Court opined:

> ". . . the question is, of course, one of statutory intent. We do not think that Congress, which we cannot assume was unaware of the holding of the Abilene case (*Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907)) that a common law right of action to recover unreasonable common carrier charges is incompatible with a statutory scheme in which the Courts have no authority to adjudicate the primary question in issue, intended by the savings clause of §216(j) to sanction a procedure such as that here proposed". (Emphasis added)

It is respectfully submitted that the *T.I.M.E.* case must be construed as holding that a common law action

does not survive for the enforcement of carrier obligations described in §§216(b) and (d); and further, that a right of judicial action does not survive even though there is no right of reparation provided for in Part II of the Interstate Commerce Act.

The Interstate Commerce Act provides for substantive rights and remedies for their enforcement; the remedies concerned in Part I include a right of action by a shipper against a carrier both in Courts and before the Commission to recover damages for breach of carrier obligations.

> *Interstate Commerce Act*, §§216(e) (49 U. S. C. A. §316(3)).

As explained in the opinion of this Court in the *T.I.M.E* case, Congress saw fit to eliminate the remedy of an action for damages for past unreasonable conduct both in the Court and before the Commission from the provisions of Part II. There are, however, other remedies for enforcement of carrier obligations as set forth in the Act, pertaining to motor carriers and the shipper is not without a remedy for the protection of his interests.

Upon shipper complaint, or upon its own motion, the Commission may declare carrier conduct violative of the Act and order compliance with the statutory provisions.

> *Interstate Commerce Act*, §216(e) (49 U. S. C. A. §316(3)).

On its motion or upon request of a shipper, the Commission can avail itself of the injunctive processes of the Federal Courts to compel the carrier to perform its

statutory obligations to provide reasonable service on a non-discriminatory basis:

> *Interstate Commerce Act*, §204(c) (49 U. S. C. A. §304(c)).

A judicial action is preserved to a shipper if charges are made in excess of those authorized for services performed.

> *Interstate Commerce Act*, §204(a) (49 U. S. C. A. §304(a)).

And finally, there is a specific provision made in Part II with respect to preservation of the right of action of a shipper for breach of the contract of carriage.

> *Interstate Commerce Act*, §219 (49 U. S. C. A. §319) (Incorporating by reference §20(11) and §20(12) of Part I).

To argue as petitioner does that a cause of action for damages must of necessity in law exist in some forum is basically untenable for a shipper has no inherent constitutional right to an action for damages for enforcement of the carrier obligation. In establishing a comprehensive and basic pattern of transportation regulation by virtue of Congressional pre-emption in the field, Congress has simply decided that proper relationships between carriers and shippers may best be preserved and protected if the particular remedy sought by Petitioner is necessarily eliminated. The Congress has determined that the other rights and remedies as statutorily provided to the shipper with reference to its relationships with motor carriers are amply provided and protected and supplied to the said shipper under the provisions of Part II as it now reads.

3. The Decision of the Court Below Does Not Conflict With the Authorities From Other Circuits Relied Upon by Petitioner.

Petitioner asserts that the decision of the Court below conflicts with a substantial number of authorities and cites in support thereof, the following cases:

Meier & Pohlman Furniture Co. v. Gibbons (1956, 8th Cir.), 233 F. 2d. 296 (cert. den. 352 U. S. 879);

Minneapolis, etc. Railway Co. v. Pacific Gamble-Robinson Co., 215 F. 2d 126 (1954);

Merchandise Warehouse Co. v. ABC Freight Forwarding Corp., 165 Fed. Supp. 67 (1958);

Quaker State Motor Parts Co. v. Interstate Motor Freight, et al., 148 Fed. Supp. (1957).

Each of the above-mentioned authorities cited by Petitioner antedate the decision of this Court in *T.I.M.E Inc. v. United States,* and are, therefore, neither controlling nor persuasive; but furthermore, to the extent that said cases may conflict with the *T.I.M.E.* case, they must be deemed to be overruled.

In addition to the foregoing, the basic issue involved in the instant proceeding, to wit, the existence or absence of a legal right cognizable in the courts, was not passed upon in any of the cases cited. And finally, none of the cases cited by Petitioner considered the differences in Part I and Part II with respect to expressly stated shipper rights and remedies, nor did they take cognizance of the legislative history of Part II. These circumstances were deemed controlling in both the *T.I.M.E* case and in the decision of the United States Court of Appeals in *Consolidated Freightways v. United Truck Lines, supra.*

4. Application of the Rule of T.I.M.E., Inc. v. United States Was Correct and the Court Below Has Not Unwarrantedly Extended or Misapplied the Rule.

Petitioner herein contends that "the opinion of the Court of Appeals herein constitutes an unwarranted extension of the rule in *T.I.M.E Inc. v. United States,* supra". Petitioner further asserts that the decision of the Court below has broadened the rules in the *T.I.M.E* case as well as the court's earlier decision in *Texas & Pacific Railway v. Abilene Cotton Oil, supra,* so as to exclude from the court's jurisdiction any cause by a shipper against a motor carrier involving any of the duties enunciated in §216(b) and (d), where there is presented for determination any question of reasonableness whether of action on the part of the Commission, a carrier, a carrier's agents or employees, a shipper or whomsoever. Hence, Petitioner contends that a shipper will no longer be able to sue a motor common carrier in any court on any basis for the reason that no carrier would lack the ingenuity to raise and present for determination at least one pertinent issue involving a determination of the reasonableness or unreasonableness of action on the part of some person or entity in the cause and arising from or referable to the duties enunciated in the subject sections. The consequences which Petitioner claims "will flow" from this decision were not anticipated by the Court of Appeals. (Pet. pp. 15-17.) The hypothetical and somewhat ethereal "consequences" described by Petitioner cannot and do not of necessity follow from the holding in the *T.I.M.E.* case nor can such resultants as described be deemed to be before this Court for consideration.

Hypothetical situations or "conjectured consequences" are not before this Court, and of course, the Court necessarily determines only the issues presented to it. The Court below stated

> "it is not necessary for us to decide, and we do not so decide, that no common law actions have survived the M.C.A., but where, as appellant recognized here,[2] the real issue is whether or not the carrier has failed to provide service to a shipper on reasonable terms and without unjust discrimination, the District Court is without jurisdiction to hear and determine it." (Footnote omitted.)

The grant or denial of Petitioner's request for Writ of Certiorari in this case must turn not on hypothetical questions or probabilities which may ensue as a result of other cases or which may exist in other cases (*Hewitt-Robins, Inc., v. Eastern Freight-ways, Inc.*, No. 37, October, 1962 Term.), but only on the question actually presented to this Court by the record.

Barr v. Matteo (1957), 335 U. S. 171, 2 L. Ed. 2d 179, 78 S. Ct. 204;

Eccles v. Peoples Bank (1948), 333 U. S. 426, 92 L. Ed. 784.

As heretofore stated, Petitioner's argument erroneously presumes that it is legally necessary that a cause of action for damages exist in some forum. As stated in the *Consolidated Freight-ways* case the Circuit Court indicated pre-emption on the part of Congress in the field of control over the motor carrier interstate commerce activities and that Congress placed the exercise of regulatory control within the exclusive jurisdiction of the Interstate Commerce Commission. By such

pre-emption, Congress provided for administrative enforcement of the Interstate Commerce Act and indicated that the Act presented no indication or provision for private suits which might be availed by private litigants to aid the Commission in the enforcement of the Act and rules and regulations promulgated thereunder. And in the *T.I.M.E.* case, this Court in a square holding determined that no private civil remedy is available for violation of §216(b) and (d) of the Interstate Commerce Act, and the very statutory provisions under which Petitioner bases and predicates the jurisdiction of the Court evidences the situation that the standard of "reasonableness" as applied to the *T.I.M.E.* case as to tariff charges, applies equally to the obligation to provide service. Therefore, Petitioner has its right to petition the Interstate Commerce Commission for relief against a carrier's violation of the act under §§204, 216 and 219. Further, the Interstate Commerce Commission has access to the Federal Courts for enforcement of the Act and of its rules promulgated thereunder pursuant to §222(b), (49 U. S. C. A. §322(b)). In *Local 1976 United Brotherhood, etc. v. N. L. R. B.*, 357 U. S. 93, 2 L. Ed. 2d 1186, 78 S. Ct. 1011 (1958) this Court held, in rejecting the contention of the N. L. R. B. urging that the contracts involed therein were invalid as a matter of law because of the legal duties of the carriers to observe just and reasonable practices under Motor Carrier Act §216, on the basis that the carrier duty was one of reasonable service to be measured as a factual matter in each situation which might arise. The foregoing decision is significant as related to the present petition under consideration in that said case holds that

the carrier's duty to provide service is not absolute and refusal to so provide is not *per se* unlawful under the Act but becomes unlawful only if it violates the standards of "reasonableness" established in §216 of the Interstate Commerce Act.

In passing, Respondent motor carriers in the Court below asserted as an entirely separate and sufficient basis for denial of jurisdiction that the District Court lacked jurisdiction by virtue of the fact that it could not decide the case without reaching or invading issues which were solely within the exclusive jurisdiction of the National Labor Relations Board to resolve in the first instance. No direct reference to this contention is noted by Petitioner herein; but inferentially at least (Pet. pp. 10, 19 and 21.) Petitioner alludes to an additional question possibly presented concerning the carrier's duty to render service across a picket line at shipper's place of business. As the Court below determined—"having decided these appeals on the above grounds, we do not find it necessary to pass upon the merits of Appellee's affirmative defense that the District Court was without jurisdiction because the controversy between the parties raised issues which are within the exclusive primary jurisdiction of the National Labor Relations Board." And the "above grounds" being entirely adequate as a basis for its decision it would necessarily follow that to grant Certiorari in order to take up a question of law not considered or passed upon by the Court below would be contrary to the well settled practice of this Court. See *Barr v. Matteo, supra.*

Conclusion.

It is respectfully submitted that an erroneous assumption that a cause of action for damages must legally and necessarily exist in some forum arising out of the right that a shipper may have under the Motor Carrier Act to be served, does not require that there be an inherent and constitutional right to a private judicial remedy for the vindication of the right in addition to the various remedies allowed before the Interstate Commerce Commission as provided for in the Act. Suffice to say, Petitioner has brought before this Court no authority in support for the proposition asserted and significantly enough, this Court has rejected the proposition and the intent of Congress to the contrary, is clearly evidenced from the legislative history of the Interstate Commerce Act. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DONALD MURCHISON,

Attorney for Respondent T.I.M.E. Freight, Inc.

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Supreme Court of the United States

October Term, 1962

No. 28

[redacted]

Petitioner,

vs.

[redacted]

Respondents.

[redacted]

[redacted]

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 222

PENSICK & GORDON, INC.,

Petitioner,

vs.

CALIFORNIA MOTOR EXPRESS, *et al.*,

Respondents.

Brief of Respondents Pacific Intermountain Express, a corporation, and Consolidated Freightways, a corporation, in Opposition to Petition for Certiorari.

Introduction.

By its sweeping characterization of the decision below, petitioner makes it appear that this case presents broad questions of substantive law. In reality, the only questions presented are narrow ones concerning the jurisdiction of the District Court, and, as the court below found, these questions are answered by prior decisions of this Court. Accordingly a grant of certiorari would not be warranted.

Opinion Below.

The opinion of the Court of Appeals (Petition App., p. 1 *et seq.*) is reported at 302 F. 2d 391.

Questions Presented.

Notwithstanding the decision of this Court in *T.I.M.E. v. United States*, 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904 (1959), does the District Court have jurisdiction over the subject matter of a shipper's claim for damages against an interstate motor carrier arising out of the carrier's alleged unreasonable failure to render pick-up and delivery service:

(a) When complete diversity of citizenship exists?

(b) When diversity of citizenship does not exist?

Statement of the Case.

This action in its present posture is one for damages alone, although when commenced in the District Court injunctive relief was sought as well. Thus, when presented with respondents' motions to dismiss for lack of jurisdiction over the subject matter the District Court had before it petitioner's verified complaint and various affidavits submitted by both petitioner and respondents, which disclosed the following material facts:[1]

1. Petitioner, a wholesale distributor of toys, sells its merchandise to retail stores throughout the Western United States and regularly and customarily calls upon common carriers, including respondents, to deliver merchandise to it and to pick up merchandise consigned by it to its customers. It is, in the parlance of the trucking industry, a shipper. [1 Tr. 5, 6, 59-61; 2 Tr. 2d.]

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[1]Page references to the printed transcript of proceedings in Case No. 17235 in the court below will be preceded by the designation "1 Tr.", and references to the transcript of proceedings in Case No. 17380 by the designation "2 Tr." Respondent Pacific Intermountain Express will be referred to as "P.I.E.", and respondent Consolidated Freightways, as "C.F."

2. P.I.E. and C.F. are motor carriers holding certificates of public convenience and necessity duly issued by the Interstate Commerce Commission, engaged in the business of shipping goods and merchandise over federal and state highways in interstate commerce. [1 Tr. 5, 75, 83.]

3. On October 12, 1960, and continuing thereafter on October 13, 14, 17 and 18, 1960, petitioner's place of business was struck by petitioner's own employees. [1 Tr. 40, 42, 174; see also 2 Tr. 80, 86.]

4. The only known instances where either P.I.E. or C.F. allegedly failed to serve petitioner with either pick-up or delivery service occurred solely as a result of the refusal of the drivers involved to cross a picket line, maintained in connection with said strike, to serve petitioner, despite instructions from said respondents to do so. [1 Tr. 42, 77, 80, 84-88.]

The court below held that because the breach of duty complained of (the alleged failure to render service) resulted from the refusal of respondents' employees to cross petitioner's picket line at petitioner's plant, whether this alleged breach was actionable, by the very nature of those facts, depended upon the element of reasonableness or unreasonableness of the acts of respondents' employees in so refusing to cross the picket line. This, it held, demands the factual determination as to whether or not respondents failed to provide reasonable service without unjust discrimination as delineated in Sections 216(b) and (d) of the Motor Carrier Act [49 U. S. C., §§316(b), (d)]. [Petition App., p. 4, 302 F. 2d at 393.]

The question whether or not the District Court had jurisdiction to make this factual determination was found by the court below to have been answered by the decision of this court in *T.I.M.E. v. United States*, 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904 (1959), and by its own decision in *Consolidated Freightways v. United Truck Lines*, 216 F. 2d 543 (9 Cir., 1954); cert. den. 349 U. S. 905, 99 L. Ed. 1242, 75 S. Ct. 582 (1955). The rationale of these cases was held to be directly applicable to the instant case. [Petition App., p. 4, 302 F. 2d at 393.]

In its original complaint petitioner predicated jurisdiction upon 28 U. S. C. Sections 1332 and 1337, but failed to support its claims of jurisdiction under Section 1332 with either general or specific allegations as to the existence of diversity of citizenship. It now concedes the absence of diversity of citizenship with respect to respondents P.I.E. and C.F., and predicates the existence of jurisdiction of its claim against them solely on the theory that its claim arises under an Act of Congress regulating commerce. [Petition, pp. 6-7.]

ARGUMENT.

I.

Jurisdiction of Petitioner's Claim Must Necessarily Be Predicated Upon the Existence of a Private Civil Remedy Against a Motor Carrier for Failure to Perform the Duties Enumerated in Sections 216(b) and (d) of the Motor Carrier Act.

As noted above, diversity of citizenship did not exist as between petitioner, on the one hand, and respondents P.I.E. and C.F., on the other hand. Thus, if jurisdiction exists with respect to the subject matter of petitioner's claim against these respondents, the predicate for it must be found, under 28 U. S. C. Section 1337, in some Act of Congress regulating commerce.

Petitioner must therefore demonstrate the existence of a private right of action under the Motor Carrier Act, the only Act of Congress involved, and, specifically, the existence of such a right under Sections 216(b) and (d) thereof [49 U. S. C., §§316(b), (d)].

II.

This Court Held Squarely in T.I.M.E., v. United States That There Is No Private Civil Remedy Available Against a Motor Carrier for Failure to Perform the Duties Enumerated in Sections 216(b) and (d) of the Motor Carrier Act.

In *T.I.M.E. v. United States*, 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904 (1959), the United States as shipper of certain goods in interstate commerce challenged in postshipment litigation the reasonableness of motor carriers' charges made in accordance with tariffs

governing the shipments. The Courts of Appeals held that the right of the United States to resist claims for payment was derived from the common law and preserved by Section 216(j) of the Motor Carrier Act. In the Supreme Court the United States defended this ground of decision, but relied principally upon the proposition that the Motor Carrier Act itself created a judicially enforceable right in a shipper to be free from the exaction of unreasonable charges as to past shipments even though such charges reflected applicable rates duly filed with the I.C.C. The government conceded that the question of reasonableness of past rates could not itself be decided in the courts, but took the position that when such questions arise in court litigation this did not deprive the court of jurisdiction. Rather, it argued, these questions should properly be referred to the I.C.C. for decision and the results of that adjudication used to determine the respective rights of the litigants (359 U. S. at 468). Thus, two questions were presented:[2] (1) whether such judicially enforceable right arises under the Act; and, if not, (2) whether under the common law the District Court has the power to award damages for past unreasonable conduct of a motor carrier after the determination of unreasonableness has been made by the I.C.C.[3] The answer of the Supreme Court to both of these questions was negative.

As to the first question, this Court noted that, as in the instant case, the statutory provisions involved

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[2]Since this question arose in an action against the United States under the Tucker Act, 28 U. S. C. A. §1346(a)(2), no question of diversity of citizenship was presented.

[3]We do not mean to suggest that such a determination has been made in this case; indeed, no aspect of this controversy has ever been brought before the I. C. C.

were Sections 216(b) and (d) of the Motor Carrier Act [49 U. S. C. §§316(b), (d)] and stated:

> "The government urges that this language imposes a statutory duty on motor carriers not to charge or collect other than 'reasonable' rates, and asks us to imply a cause of action under the Motor Carrier Act for any shipper injured by violation of that duty. We cannot agree." (359 U. S. at 469.)

In support of this conclusion, this Court made these points, all applicable to the instant case:

1. The standards of reasonableness established by these provisions of the Act create criteria for administrative application and not justiciable legal rights (citing *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U. S. 246, 251) (359 U. S. at 469-470).

2. The express provision for a private remedy in Parts I and III of the Interstate Commerce Act and the conspicuous absence of any corresponding provision in the Motor Carrier Act (which was enacted as Part II of the Interstate Commerce Act) demonstrates congressional intent that there be no private remedy for violation of any of the provisions of the Motor Carrier Act (359 U. S. at 470-471).

3. The I.C.C. itself recognized the absence of a private remedy for violation of the provisions of the Motor Carrier Act and twice recommended amendatory legislation, which Congress twice rejected (359 U. S. at 471).

The government urged further that even if the Motor Carrier Act did not confer the claimed right, the Act, and particularly 216(j) thereof [49 U. S. C. 316(j)], must be read to preserve a pre-existing common law

right. The argument was that although the doctrine of primary jurisdiction requires reference of questions of reasonableness to the I.C.C., the common law may nevertheless be vindicated in a suit in the courts. This Court rejected this contention as well, pointing out that Congress, in declining to establish a direct reparations procedure, could not conceivably have intended the circuitous procedure advocated.

III.

The Court Below Correctly Applied the Rule of T.I.M.E. v. United States.

Petitioner contends that the decision of the court below represents an unwarranted extension and misapplication of *T.I.M.E. v. United States.* It apparently does not take issue with the determination of the Court of Appeals that the duty of respondents to serve, whether predicated upon the common law or upon statute, is measured by a standard of reasonableness; indeed, petitioner has conceded this throughout this litigation. [See, *e.g.* 1 Tr. 127; 2 Tr. 246.] Rather, petitioner seemingly contends that questions bearing upon the reasonableness of a carrier's refusal to serve should not be reserved for administrative determination. It bases this contention, not upon any claimed error in the decision of the Court of Appeals, but rather upon a "host of consequences" which, it claims, will flow from this decision. These consequences, petitioner says, were not anticipated by the Court of Appeals. (Petition, pp. 15-17.) For example, it contends, shippers will no longer be able to maintain actions to recover past charges made by a carrier in excess of its tariffs, or to recover for damage to goods in transit, and persons injured by a motor car-

rier will no longer be able to maintain actions sounding in tort for their injuries. Notwithstanding petitioner's protestations, we may not assume that the "host of consequences" described follows necessarily from the holding in *T.I.M.E.* as applied by the court below and, more pertinently, we may not assume that any of these "consequences" are now before this Court. The Supreme Court, of course, does not decide hypothetical cases but rather limits its inquiry to the rights of persons or property actually controverted in the particular case before it.

> *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U. S. 281, 289, 61 L. Ed. 722, 37 S. Ct. 287 (1917).
>
> *California v. San Pablo etc. Railroad*, 149 U. S. 308, 314, 37 L. Ed. 747, 13 S. Ct. 876 (1893).

See also:

> *Poe v. Ullman*, 367 U. S. 497, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961).

Possibly anticipating petitioner's misconception of the scope of its ruling, the court below stated specifically that:

> "It is not necessary for us to decide, and we do not so decide, that no common law actions have survived the MCA, but where, as appellant recognized here, the real issue is whether or not the carrier has failed to provide service to a shipper on reasonable terms and without unjust discrimination, the District Court is without jurisdiction to hear and determine it." (Footnote omitted. 302 F. 2d at 394.)

Petitioner refers to the decison of the Second Circuit in *Hewitt-Robins v. Eastern Freightways*, 293 F. 2d

205 (2 Cir., 1961), cert. gr. 368 U. S. 951, 7 L. Ed. 2d 385, ... S. Ct. .... (1962), suggesting that a rule of law is being developed by the Courts of Appeal that would in effect enable a carrier to defeat jurisdiction of *any* claim for breach of its contract of carriage or for breach of its duties as a carrier by raising the issue of "reasonableness". (Petition, pp. 16-17.) By so doing petitioner ignores the very real distinction between *Hewitt-Robins* and the instant case. There, the claim is made that the question is not one of "reasonableness" at all, but of breach of an implicit contractual covenant. Therefore, the petitioner in that case argues, the preemption doctrine has no application. This Court has apparently granted certiorari to review that question. Here, as has been indicated, it is conceded that the ultimate question involved would be one of reasonableness in respect to the performance of a carrier's duties under the Motor Carrier Act.

Limiting our discussion, as we must, to the issues actually presented by the case, it becomes readily apparent that *T.I.M.E.* is controlling. Precisely the same subsections of Section 216 of the Motor Carrier Act are involved; the same standard of "reasonableness" must be applied and the same considerations of national transportation policy are presented. Although this Court in *T.I.M.E.* did not deal with these precise aspects of a carrier's duty, as the Court of Appeals noted, the rationale of *T.I.M.E.* is directly applicable here.

IV.

The Decision of the Court Below Does Not Conflict With the Authorities From Other Circuits Relied Upon by Petitioner.

Petitioner contends that the decision below conflicts with the following authorities:

Meier & Pohlman Furniture Co. v. Gibbons, 233 F. 2d 296 (8 Cir., 1956), cert. den. 352 U. S. 897, 1 L. Ed. 2d 80, 77 S. Ct. 101 (1956);

Minneapolis, etc. Railway Co. v. Pacific Gamble Robinson Co., 215 F. 2d 126 (8 Cir., 1954);

Merchandise Warehouse Company v. ABC Freight Forwarding Corp., 165 Fed. Supp. 67 (S. D. Ind., 1958);

Quaker State Motor Parts Co. v. Interstate Motor Freight System, 148 Fed. Supp. 226 (E. D. Pa., 1957).

Petitioner's reliance upon these authorities is misplaced for the following reasons:

First: All of these cases were decided prior to the decision of this Court in *T.I.M.E.*, and to the extent that they conflict with it must be deemed to be overruled.

Second: The absence of a legal right cognizable in the courts—the only question considered by the court below—was not passed upon in any of these cases. In *Meier & Pohlman Furniture Co., supra*, it does not appear that the jurisdiction of the court was questioned, and the formal finding of jurisdiction is supported by no citation of authority. In *Merchandise Warehouse Company, supra*, the court dealt directly with the merits of the case after noting that objections to jurisdiction had

been defectively presented. In *Quaker City Motor Parts Co., supra,* the parties were seeking the dissolution of a mandatory preliminary injunction and, as the court pointed out particularly:

> "None of the counsel for the original defendants, intervening defendants or *amicus curiae* have challenged the court's Conclusions of Law that common carriers such as these and their employees have an obligation to deliver goods shipped by them in interstate commerce which is enforceable by a mandatory injunction . . ." (148 Fed. Supp. at 228).

Finally, in *Minneapolis, etc., Railway Co.,* the carrier defendant was interstate railroad, not a motor carrier; its duty to serve was established by 49 U. S. C. Sections 1(3), 1(4) and 1(11), and the express statutory predicate for a private civil action for damages was, therefore, found in 49 U. S. C. Section 8.[4]

Third: None of these cases involving motor carriers considered the earlier holding of the Ninth Circuit in *Consolidated Freightways v. United Truck Lines, supra,* relied upon by the court below.

Fourth: These cases took no cognizance of and are clearly inconsistent with the intent of Congress, as disclosed by the legislative history of the Motor Carrier Act. *T.I.M.E v. United States, supra,* 359 U. S. at 470-71, see also: *Garner v. Teamsters C. & H. Union,* 346 U. S. 485, 98 L. Ed. 228, 242, 74 S. Ct. 161 (1953).

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[4]The existence of provisions for damages such as §8 in Parts I and III of the Interstate Commerce Act and the absence of comparable provisions in Part II is highly persuasive as to the Congressional intent in this regard. *T.I.M.E. v. United States, supra,* 359 U. S. at 470, 3 L. Ed. 2d at 957.

V.

The Case Presents No Important Undecided Questions of Federal Law.

Petitioner suggests that the instant case presents a number of important unsettled questions of federal law, all arising out of the broad question whether the Motor Carrier Act in effect clothed all federally certificated motor common carriers with immunity from court suits for damages of virtually any kind of restricting jurisdiction over such matters to the Interstate Commerce Commission, which has no power to award damages (Petition, p. 18). The fact that Congress provided for *administrative* enforcement of the Motor Carrier Act indicates that this is the type of enforcement deemed desirable. It did not, as petitioner implies, give shippers a right which in the absence of a judicial tribunal would be meaningless; rather, it created a specialized, technically qualified forum in which shippers' rights could be adjudicated and indicated by the deliberate exclusion of other remedies that the Interstate Commerce Commission would be the sole tribunal in which disputes arising under the Act would be litigated.

Petitioner has the right to petition the Interstate Commerce Commission for relief against a carrier's violation of the Act under Section 204(*c*) [49 U. S. C. §304(c)]. The Interstate Commerce Commission has access to the Federal courts for enforcement of the Act and of its rules promulgated thereunder, under Section 222(b) [49 U. S. C. §322(b)]. It is apparent that Congress intended that the Commission define the scope of a carrier's duty to provide reasonable and nondiscriminatory service, to determine whether because of compelling considerations it is to be relieved of its usual

statutory duty, and to settle these matters within the framework of the national transportation policy. *Local 1976, U. B. C. & J. v. N. L. R. B.*, 357 U. S. 93, 109, 110, 2 L. Ed. 2d 1186, 1200, 78 S. Ct. 1011 (1958).

The holding of the court below was, of course, limited to the issues before it. Those issues were decided, as we have indicated, not by the determination of hitherto unsettled questions of law but by reference to the clear holding of this Court in *T.I.M.E.* Whatever other questions—even important questions—may remain unsettled, this case is limited to the question above stated. And, as to this question, this Court has rendered its decision and the court below has merely followed it.

Respondents contended in the courts below, as an entirely separate and adequate basis for denial of jurisdiction, that the District Court lacked jurisdiction because it could not decide the case without reaching issues which the National Labor Relations Board has exclusive jurisdiction to resolve in the first instance. Petitioner does not refer to this contention, but does indicate that there lurks in this case a further question as to the extent of a carrier's duty to render service across a picket line at the shipper's place of business (Petition, pp. 10, 19). The court below did not find it necessary to pass upon either of these questions because of its conclusion that no private judicial remedy was available to the petitioner in any event. This being an entirely adequate basis for decision, it would be contrary to the well-settled practice of this Court to grant certiorari in order to take up a question of public law which was not considered or passed upon by the court below. *Cf. Barr v. Matteo*, 335 U. S. 171, 2 L. Ed. 2d 179, 78 S. Ct. 204 (1947); *Eccles v. People's Bank*, 333 U. S. 426, 92 L. Ed. 784, 68 S. Ct. 641 (1948).

Conclusion.

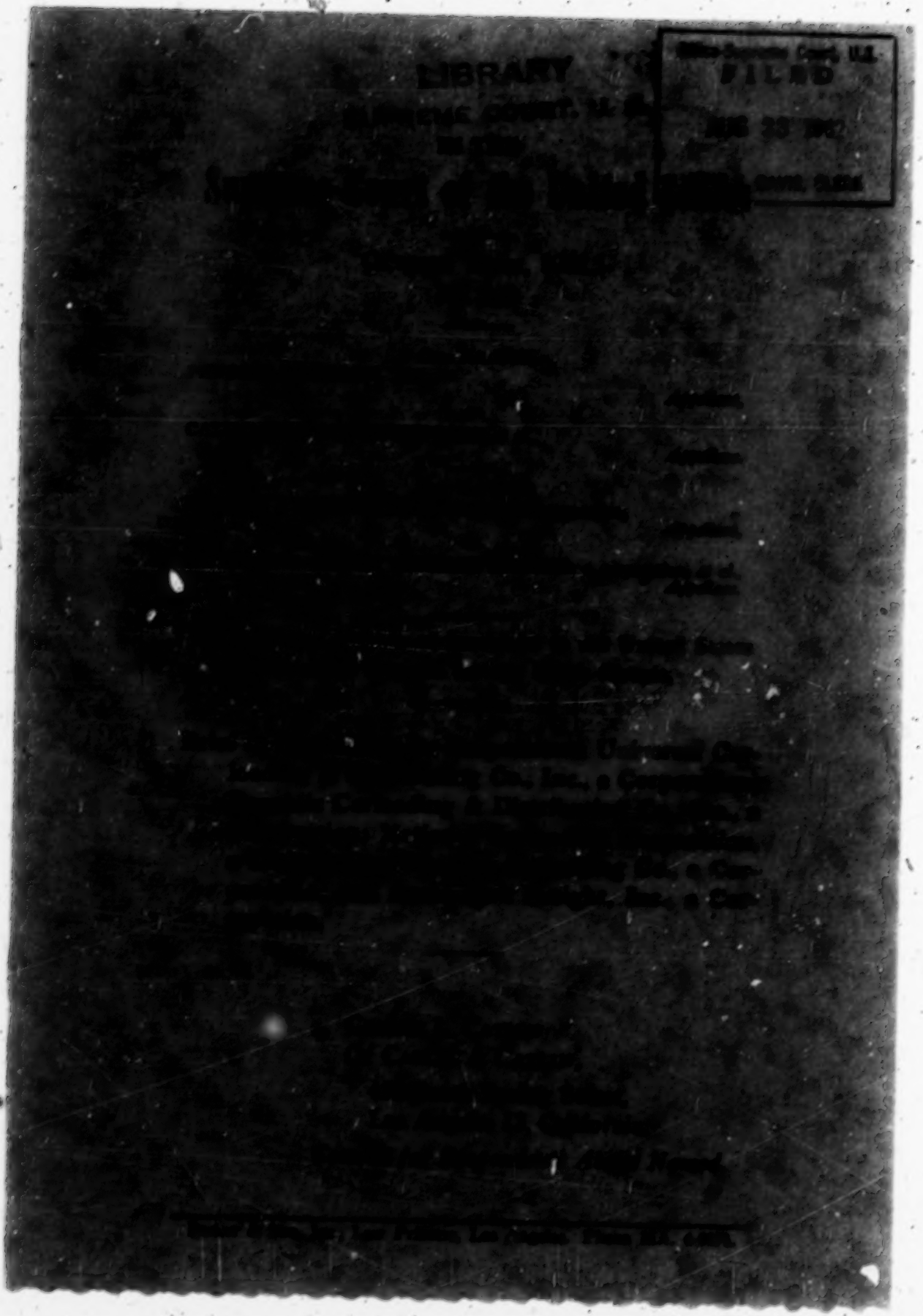
Petitioner apparently assumes that because a shipper has a qualified right under the Motor Carrier Act to be served, it therefore has a private judicial remedy for the vindication of that right in addition to the remedies before the Interstate Commerce Commission provided for in the Act. It cites no holding in support of this proposition, this Court has rejected it, and the intent of Congress to the contrary clearly appears from the legislative history of the Act. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH P. LOEB,

Attorney for Respondents Pacific Intermountain Express, a corporation, and Consolidated Freightways, a corporation.

LOEB AND LOEB,
HARRY J. KEATON,
ROBERT A. HOLTZMAN,
Of Counsel.


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 222

Case No. 17235

PENSICK & GORDON, INC.,

Appellant,

vs.

CALIFORNIA MOTOR EXPRESS, *et al.*,

Appellees.

Case No. 7380

PENSICK & GORDON, INC., a California corporation,

Appellant,

vs.

CALIFORNIA MOTOR EXPRESS, LIMITED, a corporation, *et al.*,

Appellees.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief in Opposition for Respondents Universal Carloading & Distributing Co., Inc., a Corporation; Republic Carloading & Distributing Co., Inc., a Corporation; National Carloading Corporation, a Corporation; Western Carloading Co., a Corporation; and Acme Fast Freight, Inc., a Corporation.

Opinions Below.

The Order of Dismissal of District Judge Byrne, dismissing petitioner's first amended complaint [2 Tr. 192-193] dismissed the action as to all defendants, including these freight forwarder respondents. The opin-

ion of the Court of Appeals for the Ninth Circuit has not been recorded, but is printed and attached as Appendix "A" to the petition herein.

Jurisdiction.

The jurisdictional requisites to review the opinion of the Court of Appeals are adequately set forth in the petition.

Statutes Involved.

The pertinent provisions of the Interstate Commerce Act (Part II—Motor carriers) controlling interstate motor carriers (49 U. S. C. A.; §316(b); (d) and (j)) are set forth in the petition at pages 4 through 6.

The correlative statutes, as to freight forwarders, are as follows (Interstate Commerce Act Part IV):

49 U. S. C. A., Section 1004(a) and (b).

"§1004. RATES, CHARGES, AND PRACTICES.

(a) It shall be the duty of every freight forwarder to provide and furnish, upon reasonable request therefor, the service subject to this part [§§1001-1022 of this title] covered by its permit issued under this part [§§1001-1022 of this title], and to establish, observe, and enforce just and reasonable rates and charges therefor and just and reasonable classifications, regulations and practices relating thereto and to the issuance, form, and substance of receipts and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation in service

subject to this part [§§1001-1022 of this title], and facilities for such transportation, and all other matters relating to or connected with such transportation, and every unjust or unreasonable rate, charge, classification, regulation, or practice is prohibited and declared unlawful.

(b) It shall be unlawful for any freight forwarder, in service subject to this part [§§1001-1022 of this title], to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice of disadvantage in any respect whatsoever; Provided, That this subsection shall not be construed to apply to discriminations, prejudice or disadvantage to the traffic of any carrier of whatever description."

However, there is no section corresponding to 49 U. S. C. A. §316(j) (Interstate Commerce Act, Part II) in Part IV of the Interstate Commerce Act (Freight Forwarders), 49 U. S. C. A. §1001 *et seq.*

Questions Presented.

Whether the United States District Court has jurisdiction to determine matters calling for the exercise of administrative power and discretion of the Interstate Commerce Commission.

Statement of the Case.

This litigation concerns the pickup and delivery of freight at petitioner's place of business. From the present state of the record, petitioner's premises was being picketed by members of the Teamsters' Union and respondents' truckdrivers were members of the same Teamsters' Union. Respondents' agents and employees individually refused to cross the picket line and deliver freight at petitioner's premises. [2 Tr. 130-137.] Petitioner brought this action for damages.

The United States District Court determined that it did not have jurisdiction and dismissed the action (No. 17380) as to all respondents. The United States Court of Appeals affirmed the order of the District Court. (Appendix "A" of the petition.)

Argument.

Pursuant to the Interstate Commerce Act, Parts II and IV, whether a particular rate is reasonable and whether a particular practice is reasonable is an administrative question with the exclusive primary jurisdiction vested in the Interstate Commerce Commission. The Interstate Commerce Act comprehends a scheme for federal regulation of common carriers, motor carriers and freight forwarders, so that uniformity of regulation might be had under the supervision of the expert and specialized knowledge of said Commission.

> "Whether a carrier has without justification failed to provide reasonable and non-discriminatory service is a question of defining the carrier's duty in the framework of the National Transportation Policy." (*Carpenters' Union v. Labor Board*, 357 U. S. 93, 110 (1958).)

In *T.I.M.E. v. United States*, 359 U. S. 464 (1959), in construing the instant statutes, it was held that they created only a criterion for administrative application rather than creating a legal right for shippers.

> "It is obvious from the whole setting of the Motor Carrier Act that Congress pre-empted this field of control over the motor carrier type of Interstate Commerce. It is abundantly clear that Congress intended regulatory controls to be exercised by the Commission and not by or through individuals. There is absolutely no indication in this Act or in case law that private suits might be resorted to, to aid the Commission in its enforcement of the Act and the regulation thereunder." (*Consolidated Freightways v. United Trucklines* (9 Cir., 1954), 216 F. 2d 543, at page 547.)

Commencing with *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), this Court has recognized the exclusive primary jurisdiction of the Interstate Commerce Commission and has affirmed that principle as to rates in the *T.I.M.E.* case, *supra*, and as to particular practices in the *Carpenters'* case, *supra*.

The Court of Appeals' decision herein has re-affirmed these principles and said decision is not in conflict with decisions of Courts of Appeals in different Circuits arising since the decisions of this Court in the *T.I.M.E.* and *Carpenters'* cases, *supra*.

That Congress intended the Court of Appeals' construction of the Interstate Commerce Act is clearly shown by applicable sections of Part IV thereof:

Section 1003(a) (49 U. S. C. A.) grants to said Commission the authority to make and amend rules and regulations, and Section 1003(b) grants to said Commission the authority to establish reasonable requirements for continuous and adequate service. (49 U. S. C. A., §1003(a) and (b), Appendix A.)

49 U. S. C. A., Section 1006(a) provides a sole remedy for an alleged violation of Part IV of the Interstate Commerce Act by freight forwarders: Any person may lodge a complaint with the Commission, which, on finding a reasonable ground for investigation, shall investigate the matter complained of by proper means. Section 1006(b) provides for a proceeding and a determination by the Commission of the lawful rate thereafter to be charged or the lawful "practice thereafter to be made effective." (49 U. S. C. A., §1006 (a) and (b), Appendix B.)

Conclusion.

Petitioner's arguments and fears are without merit and are unfounded. It is respectfully urged that the opinion of the United States Court of Appeals for the Ninth Circuit is right and that the petition should be denied.

Respectfully submitted,

GEORGE L. CATLIN
Of CATLIN & CATLIN,
Attorneys for Freight Forwarders, Appellees and Respondents.

APPENDIX A.

49 U. S. C. A., Section 1003. GENERAL POWERS AND DUTIES OF COMMISSION:—(a) It shall be the duty of the Commission to administer the provisions of this part [§§1001-1022 of this title], and to that end it shall have the authority to make and amend such rules and regulations and to issue such orders as may be necessary to carry out its provisions.

(b) The Commission shall have authority to establish reasonable requirements with respect to continuous and adequate service.

APPENDIX B.

49 U. S. C. A., 1006. COMMISSION'S AUTHORITY OVER RATES AND PRACTICES.—(a) Any person may make complaint in writing to the Commission that anything done or omitted to be done by any freight forwarder is or will be in violation of this part [§§1001-1022 of this title]. Every complaint shall state fully the facts complained of and the reasons for such complaint. If such freight forwarder shall not satisfy the complaint within a time specified by the Commission, or there shall be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(b) Whenever, upon hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of opinion that any rate or charge demanded, charged, or collected for service subject to this part [§§1001-1022 of this title], or any classification, regulation, or practice relating thereto, is or will be unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any provision of this part [§§1001-1022 of this title], it shall determine and prescribe the lawful rate or charge or the maximum or minimum, or maximum and minimum, rate or charge thereafter to be observed, or the lawful classification, regulation, or practice thereafter to be made effective.